(1)

Supreme Court, U.S.
FILED

96 818 NOV 6 1996

OFFICE OF THE CLERK

NO._____

IN THE

Supreme Court of the United States

October Term, 1996

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

Petitioners

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

Respondents

Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

---

PETITION AND APPENDIX FOR WRIT OF CERTIORARI

FREDERICK L. BERNSTEIN
FREDERICK L. BERNSTEIN, P.A.
Attorney for Petitioners
90 Main Street
Hackensack, NJ 07601
201-343-2500

54 pp

QUESTIONS PRESENTED

I. Was the municipal council's planned invasion, seizure, and physical destruction of Antonino's residential building a deprivation of his civil and constitutional rights under the Fourth, Fifth, and Fourteenth Amendments?

II. In our society, is the complete demolition of property for a municipal zoning offense a "cruel and unusual" punishment under the Eighth Amendment?

III. When petitioners' federal suit for an injunction against the threatened full demolition of their $350,000 building was timely filed and a federal judge at the outset ruled "I will not stand in their way," and complete demolition took place, did the federal judiciary fail to enforce the Fourth and Fifth Amendments to the Bill of Rights when they dismissed petitioners' suit for a remedy in damages?

PARTIES

The petitioners for this Court's review on certiorari are Antonino Maceri, a young homebuilder, whose $350,000 two-family building at 409 Nelson Avenue, Cliffside Park, New Jersey, was seized and totally destroyed by the municipal defendants (under color of state and municipal zoning law). His one-person New Jersey building corporation, Antonino Enterprises, Inc., prior to a mortgage foreclosure that took place in the wake of demolition of the building, held title to the lot and to the project and was, therefore, a necessary party to Antonino's complaint, filed in the Federal District Court in Newark. The complaint was filed August 24, 1993, in an unsuccessful effort to enjoin the demolition and for damages for its seizure and destruction. Upon dismissal of the complaint in the Federal

District Court, Antonino individually and his building corporation were appellants in the United States Court of Appeals for the Third Circuit.

Defendants to the action included the Borough of Cliffside Park in its corporate capacity; a municipal engineer, Stephen T. Boswell, who was drafting specifications for public bids to be taken for a total demolition; Brian T. McGuirt, the borough clerk, who was officially charged with receiving the bids from demolition contractors; Robert Cimmino, the municipal building official, who, unlike his predecessor,[1] was about to issue the

---

[1] Frank Pollotta, Cliffside Park's former building official, had issued a building permit for Antonino's two-family house and had testified in an earlier state zoning action that the zoning problems that developed for the builder under a new zoning amendment could be remedied by a partial demolition at a cost of $15,000-$20,000. When the municipal board of zoning appeals denied reinstatement of Antonino's building permit, Pollotta resigned, and Cimmino

municipal order for a full demolition.

The municipal defendants also included Gerald A. Calabrese, the municipality's long-time, entrenched Mayor, who also was leader of the Democratic Party in Bergen County as County Chairman when his administration gave its order to demolish plaintiff's house. Other defendants were Christos J. Diktas, Esq., and his law firm. Diktas was not Cliffside Park's borough attorney but was alleged to be Mayor Calabrese's handpicked attorney in matters relating to

---

became the borough's construction official. Antonino anticipated calling Pollotta as a witness at the trial to testify that a total demolition was unreasonable and unnecessarily destructive, other less burdensome measures for achieving zoning conformity being available; i.e., limiting use of the building to one-family, dismantling a front window balcony to meet the upgraded ground coverage requirement of the new ordinance, and partial demolition of the rearmost 5' of the building to conform to the new rear yard minimum.

Antonino's project.

In addition to the municipal parties, Calabrese Realty, a real estate brokerage firm owned by the Mayor's son and brother, was a defendant. Antonino intended to prove that, unlike other builders, he had rejected another official's "friendly advice" that he give the listings for the project to the realty firm run by the Mayor's relatives; he claimed that the full demolition order was a cruel and deliberate punishment ordered solely for his project, not at all for zoning reasons but because he had refused to "play ball" with Calabrese Realty.

Thomas Tormey was a Cliffside Park resident who Antonino claimed had been used by the Mayor as a citizen objector to give a semblance of validity to the municipal government's seizure and destruction of the property for zoning

reasons.

Demolition bids not having been opened when the complaint was filed in August, 1993, the fictitious John Doe defendants were named so that a temporary injunction would bind and apply to the unknown successful bidder for the municipal demolition contract.

Defendant Gerald A. Calabrese, Jr., the Mayor's son, was a principal in Calabrese Realty, but nonetheless, in his capacity as an appointed county tax commissioner, had signed a judgment in a related state tax appeal denying a property tax reduction to Antonino, despite revocation of Antonino's building permit and despite the manifest conflict of interest arising from Calabrese Realty's dispute with Antonino. The failure to accept recusal as a tax commissioner in a case where so clear a

conflict existed evidenced defendants' willingness to abuse their official power at every level of government in the effort to destroy Antonino. Without this Court's Writ reversing for trial, they succeed.

TABLE OF CONTENTS

Questions Presented..... i.

Parties..... ii.

Table of Authorities..... ix.

Constitutional and Statutory Provisions Involved..... x.

Petition for Writ of Certiorari..... 1

Opinions below..... 2

Jurisdiction..... 2

Statement of the Case..... 3

Reasons for Granting the Writ:

I. THE COURT BELOW REFUSED TO ENFORCE THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IGNORED DECISIONS OF THIS COURT REQUIRING THAT FINAL STATE ACTION BE CONSISTENT WITH THE BILL OF RIGHTS..... 17

II. THE DECISIONS BELOW FAIL TO GRANT THE FEDERAL REMEDY, 42 U.S.C., §1983, SPECIFICALLY INTENDED BY CONGRESS TO ENFORCE THE PROVISIONS OF THE FOURTEENTH AMENDMENT AGAINST FINAL STATE ACTION..... 22

III. COMPLETE DESTRUCTION OF PRIVATE PROPERTY IS A "CRUEL AND UNUSUAL" PUNISHMENT FOR A MUNICIPAL ZONING

VIOLATION IN VIOLATION OF THE EIGHTH AMENDMENT..... 26

Conclusion..... 29

Appendix..... 1A

TABLE OF AUTHORITIES

Cases

Backus v. Fourth Street Union Depot Co., 169 U.S. 557, 573, 575(1898)... 21

Chicago, Burlington & Quincy R.R. Co., v. Chicago, 166 U.S. 236, 234-35 (1897)..... 17

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961) 5 L.ed.2d 492,.....22,24

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978).....24,25

Pumpelly v. Green Bay & Mississippi Canal Co., 13 Wall. 166, 20 L.Ed. 557 (1872).....19,20

Trop v. Dulles, 356 U.S. 86, 78 S. Ct., 2 L.Ed. 2d 630 590 (1958)..... 27

United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946)... 24

Welch v. Swasey, 214 U.S. 91, 53 L. Ed. 923, 929 (1909)..... 21

Wilkerson v. Utah, 99 U.S. 130, 135 (1879)..... 26

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. ***Fourth Amendment:***
"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

2. ***Fifth Amendment:***
"[N]or shall any person . . .be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. ***Eighth Amendment:***
". . . cruel and unusual punishments [shall not be] inflicted."

4. ***Fourteenth Amendment:***
"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. ***Civil Rights Act of 1866, 42 U.S.C., §1982:***
"All citizens of the United States shall have the same right, in every State and Territory, . . . to. . . sell, hold, and convey real and personal property."

6. ***42 U.S.C., §1983:***
"Every person who, under color of any statute, ordinance, regulation. . . of any

State. . .subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

NO. _____

IN THE

Supreme Court of the United States

October Term, 1994

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

Petitioners

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

Respondents

Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Antonino Maceri and Antonino Enterprises, Inc., respectfully pray that

a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 5, 1996.

OPINION BELOW

Opinion of the United States Court of Appeals for the Third Circuit (No. 95-5224)(July 5, 1996) unpublished (4A). Antonino's petition for rehearing was denied by the Court of Appeals by Order of August 8, 1996, a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc. (11A).

JURISDICTION

The Judgment of the Court of Appeals was entered on July 5, 1996. The petition for rehearing was denied by Order dated August 8, 1996. This petition is filed within 90 days of that date. The Court's jurisdiction is invoked under 28

U.S.C.,§1254(1).

STATEMENT OF THE CASE

It is the special province of the federal courts to enforce the Bill of Rights. Our whole constitutional government, with limited rights granted to the states and federal remedies guaranteed to restrain the lawless acts of local officials, becomes formless and meaningless if the federal judiciary will not enforce the Constitution. This is a clear case in which the federal courts, over which this Court sits in supervisory review, have failed to do so.

Antonino's complaint, filed August 24, 1993, seeking an injunction against the cruel and revengeful destruction of his two-family edifice, built at a cost of $350,000, was dismissed. On motion for a preliminary restraining order, to remain

in effect pendente lite until the proofs were heard (Antonino prayed for a trial by jury), the federal district court ruled:

> "There will be no injunctive relief. The municipality is free to do what it wishes. But I would urge both of you to try to resolve the matter in what I am informed by counsel is a relatively reasonable cost-effective manner, namely, bring the building into compliance, but that is if the municipality wants to tear it down tomorrow, I will not stand in their way."
>
> "Nothing has been presented which indicates that I should stand in their way. . . . .You are aware that the Court of Appeals has judges here in this area, and any application for a stay should be addressed. . .to any Court of Appeals judge that you wish to address it to."

On an interlocutory application to the Court of Appeals, a Circuit Judge ruled that, Antonino having engaged in the project for commercial reasons, his lost profits would be compensable in damages. The remedy in damages being adequate, an injunction against a total destruction of the property was denied in the Court of

Appeals as well.

Unrestrained, Mayor Calabrese and the Cliffside Park Council let the demolition contract, and the municipal seizure and destruction of Antonino's building followed in short order, virtually bankrupting him. His mortgagee swiftly foreclosed, and the $350,000 poured into the project was lost.

Cliffside Park's motion for dismissal of the case even for a remedy in damages was granted, and the Court of Appeals affirmed.

This case thus raises vital issues of federal constitutional and statutory law. The record is not cloudy. No narrow, technical matters remain to be illumined. The lower federal courts have permitted municipal contractors physically to destroy plaintiffs' $350,000 house and, following demolition, have left the owner

without even a day in court, much less a remedy in damages for the taking. The fundamental guarantees of the Fourth, Fifth, and Eighth Amendments, to this plaintiff, are utterly without meaning.

The court of appeals "moved by the tragedy that has befallen" plaintiffs, would have us accept the result on the theory that the federal judiciary may enforce the Constitution only when there is a "clean slate."[2] The denial of constitutional protection was said to stem from technical defenses asserted by the municipality resulting from res judicata and prior state zoning litigation. But the extensive zoning litigation that had taken place in the state courts had not touched on the

---

[2]"Unfortunately for plaintiffs, we do not write on a clean slate." Memorandum Opinion, at 4A.

central issue raised here--the constitutionality of a municipal council's total demolition of a citizen's property when other less burdensome measures--a $15,000 reconfiguration of the interior--would have cured any zoning shortage.

In contrast to the Third Circuit's finding that the central issue was barred by res judicata, Hon. John C. Lifland, in vacating sanctions against both plaintiffs and against plaintiffs' counsel and in denying defendants' motions for an alleged violation of Rule 11, found that the issue of zoning enforcement by total vs. partial demolition of the structure was not an issue previously considered or decided by the state courts, and that plaintiffs were not to be sanctioned for having sought to prevent an unconstitutional and excessive total demolition when other less drastic zoning enforcement steps were available.

If it was true, as alleged, that plaintiffs' house was blasted away by the municipality because Antonino had refused to give listings or "play ball" with a real estate agency in which the Mayor of Cliffside Park had an interest, we deal here with a punitive, intentional seizure and destruction of a citizen's property. The Fourth Amendment's guarantee of security to the people "in their persons, houses, papers, and effects, against unreasonable searches and seizures," plainly forbids the excessive and unnecessary governmental infliction of punishment and harm. The municipal agents and employees responsible for the demolition had to have been appalled to be involved in so injurious a public act; if this Court reverses the dismissal of plaintiffs' complaint, many of them will testify at the trial.

Their destruction of the plaintiffs' home had not been ordered to protect or promote the public health, safety, or morals. The demolition order rather was justified as needed to carry out a zone plan--the council's vague, new policy against two-family homes, applied only against Antonino despite the hundreds of other similar buildings constructed in densely populated Cliffside Park.

As to the necessity or reasonableness of a total demolition, there was no taking for a governmental or public use under eminent domain. None of the other two-family homes near or adjoining plaintiffs' lot at 409 Nelson Avenue was slated to be demolished. No new street, school, or park was proposed for the Nelson Avenue lot, and everyone in the Borough knew that, at the very same time that plaintiffs' two-family home was being

demolished, other building permits for new two-family homes, similar to that of the plaintiff and indeed much larger, were being granted.

It was not necessary to achieve zoning conformity for plaintiffs' home to be totally demolished. For a period of 59 years, from 1930 to 1989, Cliffside Park's built-up character had been settled; the property at 409 Nelson Avenue was centered in a two-family zone district, the R-2 district. The character of the zone did not change to a neighborhood of one-family homes upon the total demolition and removal of Antonino's structure.

Antonino's residence had been built under a two-family building permit issued on October 2, 1989. That is, his two-family plans had been submitted to and approved by Cliffside's officials, including rulings that the electrical,

plumbing, and all other detailed plans complied with all applicable building codes and requirements. The municipality changed its position with an amended zoning ordinance, Ord. #17-89, restricting his immediate area to one-family homes, adopted at or about the time that Antonino was submitting his plans for approval to the building department, but an ordinance that did not become effective as to any other builder or property owner in the borough until its filing with the county planning board on October 25, 1989. Plaintiffs stressed below that the ordinance had been adopted 59 years after the fact--after the character of the entire westerly section of Cliffside Park had been established with a mixture of one-family, two-family and multi-family properties, and that its effective date under state law (N.J.S.A. 40:55D-16) was

after his October 2 building permit.

Still, Antonino did not seek to relitigate in the federal court any issue that had been considered and decided against him in the state courts. He rather argued in the District Court:

> "However unfair and unjust the ordinance itself may be, Antonino may no longer say that Ordinance 17-89 is an invalid land use regulation because of any technical or other defects in the process of its enactment and adoption by the council in August, 1989. . . .In this case, there is much merit to the plaintiffs' legal position--the Planning Board public hearing on the new land use plan did not occur until May 10, 1990, more than 8 months after plaintiff's building permit had been issued. The state courts have nonetheless upheld Cliffside Park in this regard, and it, therefore, must be accepted for present purposes that Ordinance 17-89 is a fact of life and that it has general validity throughout the municipality." (Plaintiffs' brief in support of motion for preliminary restraint against demolition of premises, at p.3)

Antonino's federal complaint was filed August 24, 1993, not to relitigate

the issues decided in the state courts but principally because Antonino had received a July 21, 1993 letter from the Construction Official mentioning removal of the entire structure (Exh.1 annexed to plaintiffs' federal complaint) and because the municipality had published a public notice, captioned as "Advertisement for Bids" on August 17, 1993, stating:

> "DEMOLITION OF BUILDING
> 409 NELSON AVENUE
> The work to be performed under this contract includes demolition and removal of a three-story stone structure house approximately 38' x 54' of frame construction and concrete block foundation."

One week earlier, at a Council meeting held August 10, 1993, Mayor Calabrese had signed a resolution awarding an engineering contract and stating in its preamble:

> "WHEREAS, there exists in the Borough of Cliffside Park a need for the

services of a civil engineering firm to prepare specifications for the Demolition of Building at 409 Nelson Ave."

Plaintiffs' federal complaint was an attempt to stop the municipality's plan to award a contract for a full demolition to the lowest bidder. Paragraph 1 stated:

"Plaintiffs seek injunctive relief against demolition of their premises and damages in excess of $350,000."

Paragraphs 11 and 12 of the complaint alleged:

"11. Defendant, Brian T. McGuirt, is the Borough Clerk of the Borough of Cliffside Park. Unless enjoined from doing so by this Court, he has publicly advertised that he intends to open and read bids for the doing of the demolition work now being submitted by demolition contractors."

12. Defendant, John Doe, is a fictitious name to include any demolition contractor whose bid is accepted by the Borough and any other persons participating in the conspiracy to injure and demolish plaintiff's property; the actual identity of this defendant is not now known."

Res judicata, of course, turns on

whether a prior judgment was rendered on the merits of a claim that had in fact been previously litigated. Here, it is simply not correct to say that there had been a "full and ample opportunity to adduce" the proofs in the state courts to prove plaintiffs' federal claims. If demolition of the property had not even been mentioned in the first case, much less ordered by any state court, as Judge Lifland expressly found in the Federal District Court, there was no basis for the Court of Appeals to refuse to enforce plaintiffs' Fourth and Fifth Amendment rights. In point of fact, the constitutional issues were not "foreclosed in federal court by the doctrine of res judicata." In brief, the lower court opinions contradict each other:

(a) The Third Circuit panel held that "plaintiffs assert precisely the same

constitutional issues as those raised in the state litigation."

(b) Judge Lifland, in vacating sanctions in the district court, found:

> "I am satisfied that demolition as a remedy was not previously addressed by anybody."

We respectfully submit that, without the testimony of witnesses and proofs, neither of the opinions below can withstand analysis. If Antonino's property was destroyed because he refused "to play ball" with Calabrese Realty, as he maintains and as he stands ready to prove to a federal jury, this petitioner's constitutional and civil rights were unquestionably violated; this Court's writ of certiorari should issue, together with a summary order reversing the grant of defendants' dismissal motions and remanding for trial. Above all, the federal judiciary must stand ready to

enforce the Bill of Rights.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW REFUSED TO ENFORCE THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IGNORED DECISIONS OF THIS COURT REQUIRING THAT FINAL STATE ACTION BE CONSISTENT WITH THE BILL OF RIGHTS.

The lower federal courts, recognizing the injury, indeed "the tragedy," shown here, nonetheless failed to apply the protection against the physical destruction of private property prohibited by the Fourth and Fifth Amendments. In so ruling, the lower courts lost sight of Mr. Justice Harlan's Opinion in Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 234-35 (1897):

> "But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the

fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form. . . . Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on Constitutional Law says, 'is that of enjoying private property without undue interference or molestation.' The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.'. . .

[I]t must be that the requirement of due process of law in that Amendment is applicable to the direct appropriation by the state to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation."

This Court has frequently encountered

claims by government agencies of a right to inflict damages on private property without being answerable for a one-time physical invasion. This Court has rejected such claims where the property has been left with total destruction. In Pumpelly v. Green Bay & Mississippi Canal Co., 13 Wall. 166, 20 L.Ed. 557 (1872), the building of a dam had so raised the nearby waters as to overflow and totally destroy 640 acres of the plaintiff's land. In an Opinion by Mr. Justice Miller, this Court held that the momentary character of the physical invasion did not make it any the less a compensable taking, saying:

> "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on the subject beyond the power of ordinary

> legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." 20 L. Ed., at 560.

This is no more than to say that there are limits to the amount of destruction or impairment of the enjoyment or value of private property which public authorities may accomplish without the necessity of paying compensation therefor.

In Pumpelly, the Court dealt with the physical destruction of property as an uncompensated taking, reversed the

contrary judgment of the circuit court, and remanded to that court for further proceedings not inconsistent with its Opinion. See Backus v. Fourth Street Union Depot Co., 169 U.S. 557, 573, 575 (1898).

In zoning measures as well, this Court, in sustaining a City of Boston height restriction, insisted that exercises of "so-called police power" must have a "real, substantial relation to a public object which government can accomplish," ruling:

> ". . .If the statutes are arbitrary and unreasonable and beyond the necessities of the case, the court will declare their invalidity." Welch v. Swasey, 214 U.S. 91, 53 L. Ed. 923, 929 (1909); emphasis added.

So, too, here, the full destruction of Antonino's property plainly went "beyond the necessities of the case," inflicting a loss of $350,000 on the owner when any legitimate police power objective would have been served with a $15,000 partial

reconfiguration of Antonino's building.

II. THE DECISIONS BELOW FAIL TO GRANT THE FEDERAL REMEDY, 42 U.S.C., §1983, SPECIFICALLY INTENDED BY CONGRESS TO ENFORCE THE PROVISIONS OF THE FOURTEENTH AMENDMENT AGAINST FINAL STATE ACTION.

The Civil Rights Act of 1871, 42 U.S.C., §1983, expressly precludes "the deprivation of any rights, privileges or immunities secured by the Constitution" by any person acting "under color of any statute, ordinance, regulation, or other state law"; it provides that any such local agents "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The purposes of §1983 were articulated by this Court in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.ed. 2d 492 (1961). There, as here, a federal district court

had dismissed a civil rights complaint as stating no cause of action, and the court of appeals affirmed. On certiorari, this Court reversed insofar as it held that the complaint stated a valid cause of action against the defendant police officers. The invasion of the petitioners' home had amounted to a search without a warrant. This Court stated:

> "The question with which we now deal is the narrower one of whether Congress, in enacting Section 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position . . . .We conclude that it did so intend." 5 L.ed. 2d, at 497.

In Mr. Justice Douglas' Opinion, the Court stated:

> "The *third* aim was to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice." Id., at 498
>
> ". . .The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right

> in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." Id., at 501.

In the light of Congress' intent to provide a federal remedy to deal with abuse of power by local officials, it is impossible to reconcile the dismissal of Antonino's complaint in this case with the philosophy expressed by this Court in Monroe v. Pape.

The lower courts' dismissal here disregards a settled line of cases holding that the government may not destroy private property except for a public purpose, and then only by compensating for the taking. See, e.g., United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). See, especially, Mr. Justice Rehnquist's dissent in Penn

Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978). By a landmarks designation, Penn Central was limited in the exercise of its development rights to build above its Grand Central terminal. This Court's majority found that all use of the air rights had not been destroyed in that some portion of the airspace above the terminal remained buildable and, in any event, the same development rights, although restricted at the site of the Terminal, were transferable to at least eight parcels in the vicinity. In dissenting, Mr. Justice Rehnquist wrote:

> "Appellees [have] destroyed--in a literal sense, 'taken'--substantial property rights of Penn Central. . . .But an examination of the two exceptions where the destruction of property does not constitute a taking demonstrates that a compensable taking has occurred here. . . .Here, however, a multimillion dollar loss has been imposed on appellants. . . .It is exactly this imposition of general costs on a few individuals at

> which the 'taking' protection is [directed]. . . .But it is precisely this sort of discrimination that the Fifth Amendment prohibits. . . .The Court has frequently held that. . .a destruction of property rights. . . requires compensation under the Fifth Amendment. . . .[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."

III. COMPLETE DESTRUCTION OF PRIVATE PROPERTY IS A "CRUEL AND UNUSUAL" PUNISHMENT FOR A MUNICIPAL ZONING VIOLATION IN VIOLATION OF THE EIGHTH AMENDMENT.

In other societies, even to this day, it may be permissible for government agents to bomb, wreck, or blast away an offender's home. In the United States, however, demolition of property as a form of punishment is unthinkable.

The Eighth Amendment provides that "cruel and unusual punishments" shall not be inflicted. In Wilkerson v. Utah, 99 U.S. 130, 135 (1879), this Court observed that:

> "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted, but it is safe to affirm that punishments. . .in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution."

Recently, in Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L. ed. 2d 630 (1958), Chief Justice Warren, in a case dealing with the deprivation of citizenship upon conviction by court martial for desertion, noted that "the exact scope of the constitutional phrase 'cruel and unusual' had not been detailed by this Court." 2 L. ed. 2d, at 642.

> ". . .The words of the Amendment are not precise, and. . .their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. We believe. . .that use of denationalization as a punishment is barred by the 8th Amendment."

> ". . .This punishment is offensive to cardinal principles for which the Constitution stands. . . .[T]he task of resolving [the issue of

> constitutionality]. . .is inescapably ours. . . .We are oath-bound to defend the Constitution. . . .If we do not, the words of the Constitution become little more than good advice. . . .We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication." Id., at 644.

In a footnote, the Court noted that the word "unusual" has a meaning apart from the word "cruel," noting that "the meaning should be the ordinary one, signifying something different from that which is generally done."

> "Denationalization as a punishment certainly meets this test. It was never explicitly sanctioned by this Government until 1940 and never tested against the Constitution until this day." Id., at 642, fn.32.

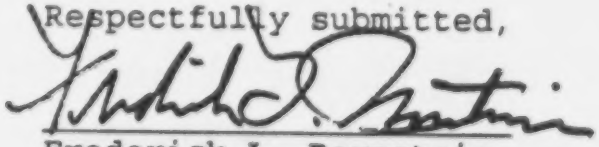
The same is the case here. This Court's writ of certiorari should issue to establish that the complete destruction of private property is a "cruel and unusual" punishment for a municipal zoning

violation under the Eighth Amendment.

CONCLUSION

Petitioners, for the reasons set forth herein, respectfully pray this Court to grant this petition for a writ of certiorari. Unless this petition is granted, Antonino has no other course of redress for the protection of his constitutional rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments. For these various reasons, this petition for certiorari should be granted, his dismissed complaint reinstated, and the matter remanded to the district court for trial and further proceedings not inconsistent with this Court's Opinion.

Respectfully submitted,



Frederick L. Bernstein
Frederick L. Bernstein, P.A.
90 Main Street
Hackensack, NJ 07601
201-343-2500

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November, 1996, I filed the required copies of the Petition for Writ of Certiorari in the Clerk's Office, and have served the required copies of the Petitioners' Writ to:

Liebowitz & Liebowitz, Esqs.
Attorneys for Borough of Cliffside Park
15 Engle Street
Englewood, NJ 07631
(via regular mail)

Rogan & Faugno, Esqs.
Attorneys for Calabrese & Company Realty and Gerald A. Calabrese
125 State Street
Hackensack, NJ 07601
(via personal delivery)

Hack, Piro, O'Day, Merklinger, Wallace & McKenna, P.A.
Attorneys for Thomas Tormey
30 Columbia Turnpike
Florham Park, NJ 07932-0941
(via regular mail)

I further certify that the foregoing were the only attorneys appearing for defendants/respondents in the Third Circuit.

Frederick L. Bernstein
Frederick L. Bernstein, P.A.
Attorney for Petitioners
90 Main Street
Hackensack, NJ 07601

NO. _____

IN THE

Supreme Court of the United States

October Term, 1994

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

Petitioners

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

Respondents

APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI

Excerpts from Transcript of District Court Opinion at hearing on Temporary Restraint Against Full Demolition on September 27, 1993.

"There will be no injunctive relief. The municipality is free to do what it wishes.

But I would urge both of you to try to resolve the matter in what I am informed by counsel is a relatively reasonable cost-effective manner, namely, bring the building into compliance, but that is if the municipality wants to tear it down tomorrow, I will not stand in their way."

* * *

"Nothing has been presented which indicates that I should stand in their way. . . . .You are aware that the Court of Appeals has judges here in this area, and any application for a stay should be addressed. . .to any Court of Appeals judge that you wish to address it to."

Excerpts from Transcript of District Court Proceedings on May 8, 1995 (Vacating Rule 11 Sanctions for Alleged Duplicative Litigation)

"I don't know that he would admit to any duplication, but he says as to one important aspect of it, and the bottom line as far as his client is concerned, there was no duplication, i.e., don't tear down my building, do something else to me."

* * *

"THE COURT: Well if demolition violated his client's constitutional rights, then he is in the right court. There is no requirement of exhaustion in the state court on a Section 1983 claim."

* * *

"The complaint in this matter was no doubt triggered by the imminence of demolition and the complaint, in paragraph 28, refers to the imminence of demolition and irreparable harm about to be done by the defendants in carrying out their threat to demolish plaintiff's property, as well as by the denial of equal protection of the laws described above."

* * *

"No one has pointed me to anything in the Appellate Division decision that addresses the remedy available to the municipality to deal with the problem of the plaintiff's noncompliance with the ordinance.

So in effect, at least in part, plaintiff was raising the issue of that remedy sought by the municipality in the proceedings before me."

* * *

"I am satisfied that demolition as a remedy was not previously addressed by anybody."

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5224, 95-5423, 95-5464

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

Anthony Maceri, Antonino Enterprises, Inc. and Frederick L. Bernstein, Esq. P.A., a New Jersey professional service corporation (law firm), Appellants in No. 95-5224

Robert Cimmino, Construction Official, Borough of Cliffside Park, Brian R.McGuirt, Cliffside Park Borough Clerk, Stephen T. Boswell, Borough Engineer, Christos J. Diktas & Habeeb, a law partnership, Gerald A. Calabrese, individually and as mayor of Cliffside Park, Appellants in No. 95-5423

Thomas Tormey, Appellant in No. 95-5464

Appeal from the United States District Court for the District of New Jersey
D.C. Civil Action No. 93-cv-03803

Argued: June 5, 1996

Before: BECKER, MANSMANN, Circuit Judges, and SCHWARZER, District Judge***

(FILED JULY 5, 1996)

MEMORANDUM OPINION

BECKER, Circuit Judge.

Plaintiffs Anthony Maceri and Antonino Enterprises, Inc. appeal from an order of the district court dismissing their federal civil rights claims, brought pursuant to 42 U.S.C. §§1983 and 1985, for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). Plaintiffs claim that defendants, the Borough of Cliffside Park (New Jersey) and a number of Borough officials, infringed their constitutional rights by demolishing a property built by plaintiffs under a permit issued by the borough by later

***. Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

revoked. Plaintiffs allege that the defendants revoked their permit to build a two-family dwelling in an area where such dwellings not only abound, but where permits to build them are regularly granted to others. Plaintiffs maintain that defendants invidiously discriminated against them because plaintiffs refused to list their property for rental with a real estate agency in which the Mayor of Cliffside Park had an interest.

Unfortunately for plaintiffs, we do not write on a clean slate. This case was the subject of extensive litigation in the New Jersey state courts before it landed in federal court. While the federal claims did not form the centerpiece of the state litigation, they were fairly presented to the state courts. Plaintiffs' federal claims were contained in plaintiff Antonino Enterprises's state court

complaint and the state court resolved them adversely to plaintiffs. See, e.g., Antonino Enterprises, Inc. v. Cliffside Park Planning Bd., No. A-5166-90T5 (N.J. Super. Ct. App. Div. Oct. 28, 1992)("We have considered the other arguments raised by Antonino: [e.g.,]. . .that the Mayor influenced the Board's decision in denying the variance. . .thus constituting [sic] 42 U.S.C. Sec. 1983 claim of discrimination. . ., and find that each of these remaining issues is without merit. . . ."). Although at one point in the state proceedings, Judge Lucci, the trial judge, stated that he would not reach plaintiffs' federal claim "that day," this does not affect the disposition of this case. First, there is no indication that the plaintiffs were precluded from raising the federal claims on other days of the protracted state trial. Second, insofar

as plaintiffs were limited in presenting their federal claims in state court, plaintiffs concede that they agreed to such limitations in exchange for the trial judge's refusal to grant defendants' motion for adjournment. Plaintiffs cannot now complain about the results of their agreement. In view of this state court history, the plaintiffs' claims are, as Judge Lifland property concluded, foreclosed in federal court by the doctrine of res judicata and the New Jersey entire controversy doctrine.****

Plaintiffs have argued that these doctrines do not bar the federal action because the property had not yet been demolished during the state proceedings.

****We note that the latter doctrine is the most expansive version of claims preclusion with which we are familiar; it not only bars claims against parties to the prior action but also against those who might have been parties.

We are sympathetic to this claim, but unfortunately it is unavailing. While plaintiffs' federal court action sought new remedies based on the demolition, plaintiffs assert precisely the same constitutional issues as those raised in the state litigation. We have looked carefully at all of plaintiffs' claims, moved by the tragedy that has befallen them. We are constrained, however, by res judicata and the entire controversy doctrine. Accordingly, the order dismissing plaintiffs' complaint must be affirmed.

We have also considered defendants' cross appeal from the district court's order vacating the sanctions previously imposed upon plaintiffs and plaintiffs' counsel under Fed. R. Civ. P. 11. We conclude, however, that Judge Lifland did not abuse his discretion in so ruling and

hence that order will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-5224, 95-5423, 95-5464

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

(D.C. Civil Action No. 93-cv-03803)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, Circuit Judges, and SCHWARZER, District Judge.*

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

---

*. As to panel rehearing only.

The petition for rehearing filed by appellants having been submitted to the judges who participated in the decision of this Court, and to all other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

Dated: Aug - 8 1996

Supreme Court, U.S.
FILED

96 818 NOV 6 1996

OFFICE OF THE CLERK

NO._____

IN THE
Supreme Court of the United States
October Term, 1996

ANTHONY MACERI;
ANTONINO ENTERPRISES, INC.

Petitioners

v.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. MCGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & COMPANY REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name

Respondents

Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

---

SUPPLEMENTAL APPENDIX

FREDERICK L. BERNSTEIN
FREDERICK L. BERNSTEIN, P.A.
Attorney for Petitioners
90 Main Street
Hackensack, NJ 07601
201-343-2500

35 pp

INDEX TO SUPPLEMENTAL APPENDIX

Page

Order entered March 3, 1995, in the United States District Court, District of New Jersey.....1sa

Opinion accompanying March 3, 1995 Order.....2sa

Excerpts from District Court Orders Vacating Sanctions, entered June 6, 1995, and June 27, 1995.....32sa

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANTHONY MACERI AND ANTONINO ENTERPRISES, INC.	:	CIVIL ACTION NO. 93-3803 (JCL)
Plaintiffs	:	
v.	:	ORDER
ROBERT CIMMINO, et al	:	
Defendants	:	

LIFLAND, District Judge

For the reasons set forth in the accompanying Opinion, IT IS on this 3rd day of March, 1995, **ORDERED** that defendants' motions to dismiss the Complaint for failure to state a cause of action are granted.

IT IS FURTHER ORDERED that the motions of defendant Tomey and defendant Calabrese, Jr. for summary judgment are denied as moot.

IT IS FURTHER ORDERED that all defendants' motions for attorneys' fees and costs are granted. Counsel shall

submit the appropriate certification to support the amount of counsel fees and costs within 30 days.

/s/ John C. Lifland
JOHN C. LIFLAND
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ANTHONY MACERI AND ANTONINO ENTERPRISES, INC.	:	CIVIL ACTION NO. 93-3803 (JCL)
Plaintiffs	:	**OPINION**
v.	:	
ROBERT CIMMINO, et al	:	
Defendants	:	

LIFLAND, District Judge

Defendants Robert Cimmino, Brian T. McGuirt, Steven T. Boswell, Christos J. Diktas, Diktas & Habeeb, and Gerald A. Calabrese move collectively as "municipal defendants" to dismiss the Complaint for

failure to state a cause of action pursuant to Fed.R.Civ.P. 12(b)6, and for attorneys' fees and costs pursuant to Fed. R. Civ. P. 11. Defendants Thomas Tomey and Gerald Calabrese, Jr. move for dismissal pursuant to Fed. R. Civ. P. 12(b)6 by joining in the municipal defendants' motion, and also move for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiffs oppose all defendants' motions. For the reasons set forth below, the Court will grant municipal defendants' motion to dismiss the Complaint for failure to state a cause of action; grant defendant Tomey's motion to dismiss the Complaint for failure to state a cause of action; grant defendant Calabrese, Jr.'s motion to dismiss the Complaint for failure to state a cause of action; and award municipal defendants, defendant Tomey and defendant Calabrese, Jr.

attorney's fees and costs.

BACKGROUND

Plaintiff Antonino Enterprises, Inc. ("Antonino"), is a building corporation which has constructed a number of homes in Cliffside Park, New Jersey. Plaintiff Anthony Maceri is the owner of Antonino Enterprises. Defendants are residents and/or officials of Cliffside Park. Much of the relevant background information is set forth in a Letter Opinion of New Jersey Superior Court Judge Benedict E. Lucchi dated April 10, 1991. Judge Lucchi's Opinion concerned the trial of three consolidated cases (Docket numbers L-9350-90, L-04926-90 and L-4927-90) involving the zoning regulations of Cliffside Park. Plaintiff Antonino was plaintiff in two of the cases before Judge Lucchi.

Plaintiff Antonino owns a lot in what was formerly a two-family zone located at 409 Nelson Avenue in Cliffside Park. On August 8, 1989, the municipality adopted a new zoning ordinance which placed plaintiff's lot in an exclusively one-family zone. On September 1, 1989, plaintiff submitted an application to build a two-family home on the lot to defendant Robert Cimmino, a Cliffside Park construction official.

On October 2, 1989, the construction official mistakenly issued a building permit to construct a two-family house. By January 3, 1990, the construction official realized that he had issued the building permit in error and issued a stop-work order for plaintiffs' unfinished home. Plaintiff then applied to the Cliffside Park Board of Adjustment for variances which would allow him to

continue construction.

On February 26, 1990, plaintiff presented testimony to the Board of Adjustment in an effort to obtain the necessary variances. On April 23, 1990, the Board voted to deny plaintiff's application for variances. By this time, Plaintiff's house was largely completed. Plaintiff subsequently instituted suits challenging the adoption process of the Cliffside Park zoning ordinance, and seeking to have the building permit reinstated. Defendant Gerald Calabrese was a defendant in the state court litigation, along with Frank Pollotta (identified as a Cliffside Park construction official) and the Cliffside Park Board of Adjustment. Defendants McGuirt, Boswell, Diktas, Diktas & Habeeb, Tomey, Calabrese & Company Realty, Inc., and Gerald Calabrese, Jr., were not

defendants in the state court litigation.

Plaintiff asserted that the zoning ordinance was improperly adopted under New Jersey law. The state Court disagreed, and noted that plaintiffs were in violation of certain zoning requirements under either the former or present zoning ordinance, and that plaintiff would therefore need a variance to proceed with construction under either ordinance.

Plaintiff alleged that while his application was being rejected by the Board of Adjustment, another property owner received approval to build a two-family home in the same one-family zone. Plaintiff alleged that this showed disparate treatment by the Cliffside Park zoning authcrities. The Court found this claim to be without merit, noting that the issuance of variances is "fact-sensitive", in that a particular structure may be

acceptable at one location and unacceptable at another. The Court further held that estoppel would not operate in plaintiff's favor, because under New Jersey law defendants had a right to revoke plaintiffs' building permit despite the construction official's error and plaintiff's reliance on that error.

Plaintiffs alleged that their due process and equal protection rights were violated and sought relief under the Civil Rights Act. Judge Lucchi found no evidence of bad faith, maliciousness, or discriminatory intent on the part of the defendants and therefore denied the claim. The Court further held that all of plaintiff's claims "not expressly discussed in this opinion" were without merit and therefore denied.

Plaintiff appealed to the Appellate

Division. The Appellate Division affirmed and considered the other arguments raised by plaintiff: that the Board of Adjustment's attorney was also the Planning Board attorney and his involvement in drafting the new zoning Ordinance amounted to a conflict of interest; that Cliffside Park Mayor Gerald A. Calabrese influenced the Board's decision in denying plaintiff's variance application and in granting another homeowner's application; and that the ordinance did not take effect until after the town filed the latest zoning map with the Planning Board. The Appellate Division found each of these arguments to be without merit. The Supreme Court of New Jersey denied certiorari.

On August 24, 1993, defendant filed a Complaint in this Court. The Complaint names the following defendants:

(a) Robert Cimmino, who, in his capacity as the construction official of Cliffside Park, allegedly ordered plaintiffs to remove the structure at 409 Nelson Avenue.

(b) Stephen T. Boswell, who, in his capacity as the Borough Engineer of Cliffside Park, allegedly prepared specifications for the demolition of plaintiff's structure.

(c) Calabrese & Company Realty, a New Jersey real estate brokerage firm; Cliffside Park Mayor Gerald A. Calabrese; Ralph Calabrese, the brother of Mayor Calabrese and president of Calabrese Realty; and Gerald A. Calabrese, Jr., the mayor's son and a Commissioner of the Bergen County Board of Taxation.

(d) Christos J. Diktas, an attorney who allegedly represented both the Board of Adjustment and Mayor Calabrese.

Defendant Diktas allegedly accepted retainers from various municipal entities in violation of his professional obligations as Board of Adjustment attorney.

(e) Diktas & Habeeb, a professional corporation which allegedly received the improper retainers mentioned above.

(f) Thomas Tomey, a resident of Cliffside Park and a neighbor of plaintiff Maceri.

(g) Brian T. McGuirt, the Borough Clerk of Cliffside Park, who allegedly advertised for and read bids for the demolition of plaintiffs' property.

The Complaint generally alleges that defendants conspired to revoke plaintiffs' building permit and that defendants discriminated against plaintiffs by applying the new zoning ordinance to 409 Nelson Avenue while sparing other two-

family structures in the vicinity. Specifically, the Complaint alleges, or seems to allege, that "[u]nlike other property owners and zoning applicants whose projects were approved," plaintiffs did not hire Calabrese Realty as a listing or selling broker for their two-family home. Complaint, ¶16.

The Complaint further alleges that defendants conspired to "injure" plaintiffs by revoking the building permit "without a hearing or other due process"; and that defendants failed to take action against "other projects failing to meet the stricter zoning standards of Ordinance #17-89." Complaint, ¶17.

The Complaint further alleges that defendant Diktas drafted the new zoning ordinance under substantial retainer from the "Governing Body." Complaint, ¶18. Plaintiff claims that when he applied to

the Board of Adjustment for a variance

> defendant Diktas continued to sit as Board Attorney for the Board of Adjustment on plaintiff's variance application and was specifically at the public hearing on February 26, 1990, and in connection with the drafting of the Resolution adopted April 23, 1990. Antonino was thereby denied due process of law. Complaint, ¶20.

The Complaint further alleges that while plaintiffs were appealing the denial of the variance, defendant Gerald A. Calabrese, Jr. "was sitting on the Bergen County Board of Taxation and signing a judgment that Antonino's tax appeal. . .had no merit and that the Cliffside Park real estate tax assessment. . .should be affirmed." Complaint, ¶26. Plaintiff Maceri expands on this cryptic assertion in an affidavit: he claims that when he had applied to the Bergen County Tax Board for a reduction or elimination of the tax assessment against his residence, the

Cliffside Park Tax Assessor "offered to reduce substantially or eliminate altogether the assessment" if plaintiff would withdraw his petition to the New Jersey Supreme Court (plaintiffs argue elsewhere that the "taxing authorities" made this offer). Plaintiff further alleges that when he refused to withdraw his petition, defendant Gerald A. Calabrese Jr. joined with other members of the County Tax Board in signing a Judgement affirming the $80,000 building assessment. See Certification of Plaintiff in Opposition to Motion, ¶22-27.

Plaintiff argues that defendant Calabrese, Jr. "should not have sat or participated in my tax appeal in any way." By participating in the Tax Board's deliberations, defendant Calabrese, Jr. allegedly "drew himself into [the] zoning controversy" in order to "insure the

defeat of [plaintiff's] state court case for relief." Certification, ¶26. Plaintiff's appeal of the Tax Board Judgment is currently pending before the New Jersey Tax Court. Certification, ¶22.

The Complaint further alleges that the ordinance should not have taken effect until it had been duly filed in the office of the County Planning Board. Plaintiffs claim that although defendants filed the ordinance on October 25, 1989, defendants threatened to demolish plaintiff's property on October 2, 1989. Complaint, ¶27.

DISCUSSION

Defendants argue that plaintiffs' claims have been adjudicated in state court and are barred under the Doctrine of res judicata. The Court agrees that all of plaintiffs' constitutional claims regarding the zoning ordinance, its

application to plaintiff, and the alleged conspiracy to apply the ordinance in a discriminatory manner have been adjudicated in state court. Therefore, plaintiffs' claims against defendant Mayor Calabrese are barred under the doctrine of res judicata, as Mayor Calabrese was a defendant in state court. The Court finds that the zoning-related claims against the remaining defendants are barred under the entire controversy doctrine, as outlined below. However, plaintiff's claim against Gerald Calabrese, Jr. alleging a wrongful denial of tax relief has not been adjudicated in state court. Therefore, that tax-related claim is not barred under any preclusionary doctrine.

Res Judicata

"Res judicata ensures the finality of decisions." Brown v. Felsen, 442 U.S. 127, 131 (1940). The doctrine prevents

subsequent litigation of all claims or defenses that were previously available to the parties "regardless of whether they were asserted or determined in the prior proceeding." Id.

The Supreme Court has determined that res judicata is applicable to §1983 actions. Allen v. McCurry, 449 U.S. 90 (1980).

Plaintiffs concede that the following questions have all been adjudicated in state court, and are therefore res judicata in this action: the validity of the ordinance; the Board of Adjustment's denial of plaintiff's application for a variance; and plaintiffs' application for a reinstatement of the building permit. However, plaintiffs allege that their federal claims were never adjudicated in state court. Specifically, plaintiffs assert that the state courts did not

address the equal protection question of whether the municipality could selectively apply the ordinance to plaintiffs' structure while exempting other builders.

The Court disagrees. Plaintiffs' constitutional claims regarding the zoning ordinance and its application to plaintiff clearly have been adjudicated in state court. The Appellate Division opinion addressed plaintiffs' claims of section 1983 discrimination; claims regarding the point at which the ordinance took effect; and claims that the actions of the Board of Adjustment's attorney revealed a conflict of interest. The Information Statement plaintiff filed with the Appellate Division refers to discrimination, denial of equal protection, and the remedies and sanctions available under 42 U.S.C. §§2983 to 1988.

Entire Controversy Doctrine

The remaining defendants argue that plaintiff's action is barred under the entire controversy doctrine. This doctrine holds that "the adjudication of a legal controversy should occur in one litigation in only one court" and that "accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy." Cogdell v. Hospital Center, 226 N.J. 7, 25 (1989). The purposes of the doctrine include "the needs of economy and the reduction of waste, efficiency and the reduction of delay, the need for complete and final disposition through the avoidance of piecemeal decisions." Id. (quoting 2 State of New Jersey Constitutional Convention of 1947, Committee on the Judiciary Report §II(J), at 1187 (1947)).

The entire controversy doctrine is a doctrine of judicial fairness. Crispin v. Volkswagenwer, A.G., 96 N.J. 336, 343 (1984). It has been further described as:

> a preclusionary principle intended to prevent the fractionalization of litigation by requiring all claims arising out of or relating to the same transactional circumstances to be joined in the same action. The effect of the doctrine is to preclude a party from withholding from the action for separate and later litigation a constituent component of the controversy even where that component is a separate and independently cognizable cause of action. [Citation omitted].

The doctrine relates to parties as well as non-parties. In Cogdell the Court held that the doctrine "embraces not only joinder of related claims between parties but also joinder of all persons who have a material interest in the controversy." Id. at 26. Also, New Jersey Court Rule 4:30A mandates the joinder of parties: "[n]on-joinder of claims or parties

required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine..."

Plaintiff alleges that all defendants engaged in conduct that deprived him of his civil rights under section 1983. However, plaintiff had a full and fair opportunity to litigate his section 1983 claims in state court. Therefore, the section 1983 claims against the remaining defendants relating to the denial of the zoning variance are barred. Otherwise, plaintiff would be able to render the state court litigation "merely one inning in a whole new ballgame." Blanchard v. Washington Park Building, Inc., 150 N.J. Super. 277 (App. Div. 1977).

Plaintiffs have reiterated their state court claims in a federal complalint

against a combination of old and new defendants. As plaintiffs are in control of the litigation, they bear the burden of their failure to join necessary parties and must suffer the consequences of a fragmentation of the litigation. Gross v. Cohen Dufour & Associates, 273 N.J. Super. 617 (Law Div. 1993).

Constitutional Claims Against Defendant Calabrese, Jr.

Defendant Calabrese, Jr. has moved for summary judgment pursuant to Fed. R. Civ. P. 56. He has also adopted by reference municipal defendants' brief in support of their motion to dismiss for failure to state a cause of action. Therefore, the Court will regard defendant Calabrese, Jr. as moving for 12(b)(6) dismissal as well.

A claim will be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) only when, after

viewing the pleading in the light most favorable to the plaintiff and resolving every doubt in favor of the plaintiff, "the pleading fails to state a valid claim for relief." Elysian Federal Sav. Bank v. First Interregional Equity Corp., 713 F. Supp. 737, 740 (D.N.J. 1989). See Bartholemew v. Fischl, 782 F.2d 1148, 1152 (3d Cir. 1986). Under this standard, the Court must look only to the facts alleged in the Complaint. Bissenbach v. Guenther, 588 f.2d 400, 402 (3d Cir. 1978). The Court may then dismiss the Complaint if plaintiff can prove no set of facts which would entitle him to relief. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939 (3d Cir.), cert. denied 474 U.S. 935 (1985).

Defendant Calabrese, Jr. argues that the claims against him are barred by the entire controversy doctrine. As stated

above, the Court agrees that the section 1983 claims arising out of and relating to the denial of the zoning variance are barred. However, the entire controversy doctrine does not bar the claims regarding the denial of plaintiff Maceri's application for tax relief. Plaintiff Maceri alleges that he was offered a quid pro quo: he would receive tax relief in exchange for an agreement to withdraw his appeal of the Superior Court decision. This indicates that the tax-related cause of action arose during the pendency of the zoning-related litigation. Under the entire controversy doctrine "the party whose claim is sought to be barred must have a full and fair opportunity to have fully litigated that claim in the entire action. Cafferata v. Peyser, 251 N.J. Super. 256, 261. The doctrine does not bar related claims that were unknown, or

had not arisen or accrued, at the time of the original action. Fisher v. Yates, 270 N.J. Super. 458.

However, the Court finds that plaintiffs' claim of discriminatory tax assessment fails to state a cause of action. A plaintiff in a section 1983 action may recover both compensatory and punitive damages against any municipal official or employee responsible for a deprivation of federal or constitutional rights. Smith v. Wade, 461 U.S. 30, 35-36 (1983); Carey v. Piphus, 435 U.S. 247 (1978), and may also recover compensatory damages against a municipality. Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981). To establish a cause of action under 42 U.S.C. §1983, two elements must be proved: (1) that defendant acted under color of state law; and (2) that a constitutional right has been denied.

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Phillips v. Trello, 502 F.2d 1000, 1004 (3d Cir. 1974).

Section 1983 authorizes resort to the federal courts whenever state actions, or actions taken under color of state law, allegedly infringe on constitutional rights. As an official of the Bergen County Board of Taxation, defendant Calabrese, Jr. was clearly a state actor. The Complaint alleges that the tax assessor offered to reduce plaintiff's tax assessment if plaintiff would withdraw his petition to the New Jersey Supreme Court, and that the Tax Board subsequently denied plaintiff's tax appeal. However, the Complaint fails to allege that defendant Calabrese,Jr. personally took any action designed to ensure that plaintiff was denied the tax relief he sought. The Complaint does not indicate any connection

between defendant Calabrese, Jr. and the tax assessor, or that the tax assessor's comments can be attributed to defendant Calabrese, Jr. in any way. Thus, the facts alleged, if proved, would not amount to a violation of plaintiffs' constitutional rights. Therefore, the Court will grant defendant Calabrese Jr.'s motion for dismissal pursuant to Rule 12(b)(6).

Rule 11

Defendants move for attorneys' fees and costs pursuant to Fed.R. Civ.P. 11. Rule 11 imposes specific duties upon attorneys practicing before the federal courts. It provides that an attorney who fails to either (1) read the pleading; (2) make a reasonable inquiry into the factual and legal legitimacy of the pleading; or (3) file the pleading only for a proper purpose, shall be sanctioned.

Specifically, Rule 11 provides:

> Every pleading, written motion, and other paper shall be signed by at least one attorney of record...By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
>
> (1) It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a

lack of information or belief.

The standard for testing an attorney's conduct is that of what was objectively reasonable under the circumstances. Simmerman v. Cornino, 27 F.3d 58, 62 (3d Cir. 1994) citing Eavenson, Auchmuty & Greenewald v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985). To comply with this standard, counsel "must conduct 'a reasonable investigation of the facts and a normally competent level of legal research to support the presentation.'" Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 94 (3d Cir. 1988) (citing Lieb v. Topstone Indus., 788 F.2d 151, 157 (3d Cir. 1986)). An inquiry is considered reasonable if it provides that party with an objective belief at the time the challenged paper was filed that the claim was well-grounded in law and fact. Bensalem TP. v.

International Surplus Lines Ins. Co., 38 F.3d 1303, 1314 (3d Cir. 1994).

Rule 11 targets abuse, making sanctions appropriate only if "the filing of the complaint constituted abusive litigation or misuse of the court's process." Simmerman, Id., citing Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir.), cert. denied sub nom. Herman Bros., Inc. v. Teamsters Local Union No. 430, 488 U.S. 848, 109 S.Ct. 118, 102 L.Ed. 2d 101 (1988). Thus, the failure of a complaint to withstand a motion to dismiss should not, in and of itself, be thought to establish a Rule 11 violation. Id.

The Court will award costs and fees pursuant to Rule 11. Plaintiff argues that his section 1983 zoning-related claims were not adjudicated in state court, and thus are not barred by res

judicata and the entire controversy doctrine. As set forth above, a review of the state court record reveals that these claims were clearly and finally adjudicated. Plaintiff has no factual basis for asserting otherwise. Regarding the claims against defendant Calabrese, Jr., plaintiff alleges no facts at all to support his section 1983 claim of discriminatory tax assessment. Plaintiff merely alleges that another, unrelated public official offered plaintiff a quid pro quo; that plaintiff declined this offer; and that plaintiff was subsequently denied tax relief.

There is nothing to suggest that plaintiff did not know when he filed his complaint that his zoning-related claims had been adjudicated in state court. There is no support for his claim of discriminatory tax assessment. There is

nothing in plaintiff's pleadings to suggest that he seeks to expand an existing body of law. Therefore, the Court finds that plaintiff's claims are objectively frivolous and untenable, constitute abusive litigation, and warrant an imposition of sanctions.

Dated: March 3, 1995

/s/ John C. Lifland
JOHN C. LIFLAND
United States District Judge

EXCERPTS FROM DISTRICT COURT ORDERS VACATING SANCTIONS

Order Entered June 6, 1996, by John C. Lifland, U.S.D.J.:

* * *

"**ORDERED** that the granting of Rule 11 sanctions in the form of an allowance of counsel fees and costs in favor of defendants and against Frederick L. Bernstein, Esq., personally, as set forth in the Order filed on March 3, 1995, be, and the same is, hereby vacated; . . ."

Order Entered June 27, 1995, by John C. Lifland, U.S.D.J.

* * *

"ORDERED that the application of plaintiffs to vacate the Order of March 3, 1995 imposing Rule 11 sanctions upon the plaintiffs ANTHONY MACERI and ANTONINO ENTERPRISES, INC., be, and the same is, hereby granted; . . . ."

No. 96-818 (3)

In The

Supreme Court of the United States

October Term, 1996

Supreme Court, U.S.
FILED
DEC 20 1996
CLERK

ANTHONY MACERI; ANTONINO ENTERPRISES, INC.,

Petitioners,

vs.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. McGUIRT, Cliffside Park

(Continued)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR MUNICIPAL RESPONDENTS ROBERT CIMMINO, CONSTRUCTION OFFICIAL; BOROUGH OF CLIFFSIDE PARK; BRIAN T. McGUIRT, CLIFFSIDE PARK BOROUGH CLERK; STEPHEN T. BOSWELL, BOROUGH ENGINEER; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, A LAW PARTNERSHIP; GERALD CALABRESE, INDIVIDUALLY AND AS MAYOR OF CLIFFSIDE PARK

JOSEPH A. CLARK, JR.
Counsel of Record
LIEBOWITZ & LIEBOWITZ
Attorneys for the Municipal Respondents Robert Cimmino, Construction Official; Borough of Cliffside Park; Brian T. McGuirt, Cliffside Park Borough Clerk; Stephen T. Boswell, Borough Engineer; Christos J. Diktas; Diktas & Habeeb, a Law Partnership; Gerald Calabrese, Individually and as Mayor of Cliffside Park
15 Engle Street
Englewood, New Jersey 07631
(201) 567-2900

64 pp

Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, a Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & CO. REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name,

Respondents.

QUESTIONS PRESENTED

I Does a refusal by the Federal Courts to retry issues of constitutional dimension already tried and appealed in State Courts constitute a deprivation of civil and constitutional rights?

II Where developer refuses to modify a 4 year old half-built structure to conform to zoning requirements adjudicated as valid, does demolition of the structure constitute "cruel and unusual punishment"?

III Is a developer, whose gravamen has been adjudicated and denied by State trial and appellate Courts, entitled to damages for legitimate action taken by a municipality, where no new legal or equitable duty or breach thereof has arisen?

PARTIES

The only real plaintiff party in interest in this Federal litigation, as in the State Courts, was the corporate plaintiff, owner of the property in question. That plaintiff corporation was an experienced "spot" builder in the defendant Borough. After litigating all issues, including those of federal import, in the State trial and appellate Courts, an action was commenced in the District Court seeking to vindicate the selfsame claims of the corporate plaintiff.

The individual plaintiff is the sole apparent officer, director and shareholder of plaintiff corporation. He was not an owner of the subject property and was not

a party in the prior State Court proceedings. His joinder in the Federal action would seem to serve no useful purpose other than to imply a distinction, which effects no legal difference.

In the Federal Courts, petitioners added an in terrorem factor by joining, as individual defendants, the Mayor, various municipal functionaries, the then Zoning Attorney, his firm and other persons alleged to be co-conspirators in a purported sinister plot of influence peddling and intrigue, all of which claims were broached, explored and determined in the prior State Court proceedings.

Germane to a discussion of the parties is the assessment of the District

Court Judge who dismissed the Complaint in this matter:

> ". . . I find him [plaintiff MACERI] to be **untruthful** with respect to his assets and with respect to his ability to understand the statement of his assets and that is based upon his statements prior to being confronted with the business banking statements of Antonino Enterprises for the first five months of this year." (District Court Proceedings of June 12, 1995 to reconsider Rule 11 sanctions against plaintiff MACERI - T-23-12) (Emphasis Supplied)

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Contents	v
Table of Authorities	vii
Opinions Below	1
Jurisdiction	6
Constitutional and Statutory Provisions Implicated	7
Counterstatement of the Case	8
ARGUMENT:	16
I It is Not a Deprivation of Civil and Constitutional Rights for the Federal Courts to Refuse to Retry Causes of Action Tried and Appealed in the State Courts	16

Page

II The Municipal Demolition of a 4 Year Old Half-Built Structure Which the Owner Refuses to Modify to Conform to Valid Zoning Requirements is Not Cruel and Unusual Punishment 20

III A Developer Whose Gravamen Has Been Adjudicated and Denied by State Trial and Appellate Courts is Not Entitled to Damages for Legitimate Police Power Action Taken by a Municipality, Where No New Legal Or Equitable Right Exists 24

Conclusion 26

Appendix Table of Contents 1a

Appendix 2a

TABLE OF AUTHORITIES

Page

Cases

Antonino Enterprises, Inc. v. Cliffside Park Planning Board, 133 N.J. 433 (1993) **11, 18**

Antonino Enterprises, Inc. v. Frank Pollotta, Construction Official, et al., 133 N.J. 433 (1993) **11, 18**

Bonner v. Cir. Ct. of City of St. Louis, Mo., 526 F.2d 1331 (8th Cir. 1975), cert. den., 96 S.Ct. 1418, 424 U.S. 946, 47 L.Ed.2d 353 (1976) **17**

Dennison v. County of Frederick, 726 F.Supp. 137 (W.D.Va. 1989), aff'd., 921 F.2d 50 (4th Cir. 1990), cert. den., 111 S.Ct. 2828, 115 L.Ed.2d 998 (1991) **17**

In re Quinlan, 70 N.J. 10, 37-8 (1976), cert. den. 97 S.Ct. 319, 429 U.S. 922, 50 L.Ed.2d 289 (1977) **21**

Popow v. City of Margate, 476 F.Supp. 1237, 1242 (D.N.J. 1979) **22**

United States Constitution:

Eighth Amendment **7, 20, 21**

	Page
Statutes	
28 U.S.C.A. Sec. 1254(1)	6
28 U.S.C.A., Sec. 1738	7, 17
28 U.S.C.A. Sec. 2101(c)	6
42 U.S.C.A., Sec. 1983	7, 13

N.J.S.A. 40:48-1.1	23
N.J.S.A. 40:48-2.3	22
N.J.S.A. 40:48-2.3a	23
N.J.S.A. 40:48-2.5	23
Rules	
S.C.U.S.R. 10	26
S.C.U.S.R. 13(1)	6

R. 4:30A	19

OPINIONS BELOW

The **Law Division** of the Superior Court of New Jersey heard and determined 3 related cases, which were consolidated for trial*, two of which were brought by the corporate plaintiff. Therein, that Court fully adjudicated **all** of the issues later presented to the District Court below, **save** the matter of actual demolition of the subject building, which had not yet occurred, and found for defendants, dismissing all the three Complaints.

The **Appellate Division** of the Superior Court of New Jersey fully heard and determined the appeal** of the adverse decisions in the two cases brought by the corporate plaintiff herein and affirmed

the decisions below on all issues.

The Supreme Court of New Jersey denied certification*** to the Appellate Division in the two cases sought to be appealed by the corporate plaintiff.

The United States District Court for the District of New Jersey dismissed**** the Complaint of the plaintiffs-appellants herein, on defendants-respondents' Motion, on the basis of res judicata and the entire controversy doctrine. The new issue posed by the request for an injunction of the demolition of the subject building was denied, on the basis of no probability of success on trial.

The Hon. M. I. Greenberg, U.S.C.J. (3rd Cir.) denied***** petitioners' inter-

locutory Motion for leave to appeal the refusal of the District Court below to enjoin the demolition of the subject building, on the basis that petitioners had an **adequate remedy at law.**

On full appeal, the **Court of Appeals** for the Third Circuit affirmed***** the dismissal of the Complaint by the District Court, including the refusal to interfere with the demolition of the subject building.

---

* ANTONINO ENTERPRISES, INC. **v.** FRANK POLLOTTA, CONSTRUCTION OFFICIAL OF CLIFFSIDE PARK; MAYOR & COUNCIL OF CLIFFSIDE PARK and CLIFFSIDE PARK BOARD OF ADJUSTMENT - **Docket No. BerL-4926-90**

ANTONINO ENTERPRISES, INC. **v.** CLIFFSIDE PARK PLANNING BOARD - **Docket No. BerL-9350-90**

NIKOLA MATESIC, ROZA MATESIC, FRANKO MATESIC & FRANICA MATESIC v. CLIFFSIDE PARK BOARD OF ADJUSTMENT, CLIFFSIDE PARK CONSTRUCTION OFFICIAL, MAYOR & COUNCIL OF CLIFFSIDE PARK and STIPO JURIC - **Docket No. BerL-4927-90**
Law Division - Superior Court

** ANTONINO ENTERPRISES, INC. v. CLIFFSIDE PARK PLANNING BOARD and ANTONINO ENTERPRISES, INC. v. FRANK POLLOTTA, Construction Official of Cliffside Park, MAYOR AND COUNCIL OF CLIFFSIDE PARK and CLIFFSIDE PARK BOARD OF ADJUSTMENT - **Docket No. A-5166-90T5**
Appellate Division - Superior Court

*** ANTONINO ENTERPRISES, INC. v. CLIFFSIDE PARK PLANNING BOARD

ANTONINO ENTERPRISES, INC. v. FRANK POLLOTTA, etc., et al. - **C-567 September Term 1992 36,057**
Supreme Court of New Jersey

**** ANTHONY MACERI AND ANTONINO ENTERPRISES, INC. v. ROBERT CIMMINO, Construction Official, BOROUGH OF CLIFFSIDE PARK, BRIAN T. McGUIRT, Cliffside Park Borough Clerk, STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS,

DIKTAS & HABEEB, a law partnership, THOMAS TOMEY, GERALD A. CALABRESE, Individually and as Mayor of Cliffside Park, CALABRESE & COMPANY REALTY, INC. and GERALD A. CALABRESE, JR. and JOHN DOE(S) -
Civil Action No. 93-3803 (JCL)
United States District Court

***** ANTHONY MACERI and ANTONINO ENTERPRISES, INC. **v.** ROBERT CIMMINO, Construction Official, BOROUGH OF CLIFFSIDE PARK, BRIAN T. McGUIRT, Cliffside Park Borough Clerk, STEPHEN T. BOSWELL, Boro. Engineer; CHRISTOS J. DIKTAS, DIKTAS & HABEEB, a law partnership, THOMAS TOMEY, GERALD A. CALABRESE, Individually and as Mayor of Cliffside Park, CALABRESE & COMPANY REALTY, INC. and GERALD A. CALABRESE, JR. -
Case No. 95-5224
Court of Appeals - Third Circuit

JURISDICTION

Petitioners invoke the jurisdiction set forth in 28 U.S.C.A. Sec. 1254(1), which authorizes review of decisions of the Court of Appeals by writ of certiorari. Issuance thereof is upon petition and is discretionary with the Court.

Petitioners have apparently satisfied the temporal requirements of S.C.U.S.R. 13(1) and 28 U.S.C.A. Sec. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS IMPLICATED

1. Eighth Amendment:

"...[C]ruel and unusual punishments [shall not be] inflicted."

2. 42 U.S.C.A., Sec. 1983:

"Every person who, under color of any [State] statute . . . subjects . . . any citizen . . . to the deprivation of any rights, privileges or immunities . . . shall be liable [for money damages]...."

3. 28 U.S.C.A., Sec. 1738:

"Such . . . judicial proceedings. . . shall have the same **full faith and credit** in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." (Emphasis Supplied)

COUNTERSTATEMENT OF THE CASE

Plaintiff ANTONINO was a building construction corporate entity. Plaintiff MACERI was its sole shareholder, officer, director and principal. Municipal permits were obtained for property owned by plaintiff ANTONINO for the construction of a large dwelling house, effectively containing 3 dwelling units. Prior to the actual commencement of construction, defendant BOROUGH amended its zoning to change the applicable zone from two family to one family residential homes and up-graded the "bulk" requirements of the zone in which plaintiff ANTONINO's property was located.

Upon notification of violation,

plaintiff ANTONINO applied to the appropriate municipal boards for "use" and "bulk" variances, agreeing to effectively eliminate the third dwelling unit. After hearing and plenary consideration, the variance applications were denied by such Boards of the defendant BOROUGH.

During the course of these variance efforts, plaintiff ANTONINO continued with construction so that the subject building was actually closed in completely, with windows, roof and rough plumbing (plaintiff MACERI's trade) installed.

Whereupon, plaintiff ANTONINO commenced two prerogative writs actions in the State Court, seeking to validate the construction, compel the variances, over-

turn the amended Zoning Ordinance and obtain redress for asserted violations of civil and constitutional rights. These actions were consolidated for trial and were fully tried for many days, within a period of months, with plaintiff having full and ample opportunity during that lengthy trial to adduce all its proofs concerning all of the issues raised.

The State Trial Court found against plaintiff ANTONINO in both actions, which decisions was unanimously affirmed on plenary consolidated appeal by the Appellate Division. The New Jersey Supreme Court denied Certification. Antonino Enterprises, Inc. v. Cliffside Park Planning Board and Antonino Enterprises, Inc. v.

al., 133 N.J. 433 (1993).

Upon conclusion of the full litigation cycle in the State Courts, plaintiffs were advised by defendant BOROUGH that UNLESS the subject building was rendered conforming to the applicable zoning (use and bulk requirements), it would be demolished. **Petitioners made no effort to modify said building to achieve zoning compliance** and the defendant BOROUGH commenced the extensive public bidding process for demolition.

Prior to completion of the demolition bidding process by the defendant BOROUGH, petitioners filed their action in the U. S. District Court consisting of the **self-same gravamen** set forth in the prior State

Court litigation, and adding only an application for injunctive relief anent the demolition of the subject building.

On the return date of an Order to Show Cause in the District Court, plaintiffs pointedly and specifically refused the opportunity afforded by the Court to modify the subject building so that it would comply with applicable zoning. Upon completion of the show cause application, the District Court denied the injunctive relief sought, finding that petitioners offered no probability of success upon trial.

Petitioners sought leave to appeal that interlocutory injunction denial to the Third Circuit. On hearing, Third

Circuit Judge Greenberg granted that leave, but denied the injunctive relief sought, on the basis that the statute, 42 U.S.C.A., Sec. 1983, which was the asserted basis for petitioners' relief, **authorized only a money damages award,** which was ruled to be an adequate **remedy at law.** Such adequate remedy justified the denial of extraordinary equitable relief sought, under the facts of the case.

The defendant BOROUGH proceeded with the demolition of the subject building, according to law.

On discrete Motions by the defendants for dismissal of the Complaint, for failure to state a claim upon which relief could be granted, the District Court found

that the prior State Courts had heard and determined all of the issues specified in the federal Complaint, and concluded that petitioners were precluded from relitigating all such matters.

On Motion of the Municipal Defendants, the District Court levied sanctions against the petitioners and petitioners' counsel, pursuant to Rule 11. On reconsideration, the District Court vacated the imposition of such sanctions.

Petitioners appealed the adverse rulings of the District Court to the Court of Appeals. After full briefing and argument the Third Circuit affirmed (DMa-19) * the

---

* (DMa-) designates Appendix of Municipal Respondents

District Court decision on the basis that:

> ". . . Plaintiffs' federal claims were contained in plaintiff Antonino Enterprises's state court complaint and **the state court resolved them** adversely to plaintiffs. . . ." (Pa-7) *
>
> * * * * * * * * *
>
> ". . . In view of this state court history, the plaintiffs' claims are, as Judge Lifland properly concluded, **foreclosed in federal court** by the doctrine of res judicata and the New Jersey entire controversy doctrine." (Pa-8)
>
> * * * * * * * * *
>
> ". . . While plaintiffs' federal court action sought new remedies based on the demolition, plaintiffs assert **precisely the same constitutional issues as those raised in the state litigation** . . . . We are constrained, however, by res judicata and the entire controversy doctrine. Accordingly, the Order dismissing plaintiffs' complaint must be **affirmed.**" (Pa-9) (Emphasis Supplied)

---

* **(Pa-)** designates Appendix of Petitioners

ARGUMENT

I

IT IS NOT A DEPRIVATION OF CIVIL AND CONSTITUTIONAL RIGHTS FOR THE FEDERAL COURTS TO REFUSE TO RETRY CAUSES OF ACTION TRIED AND APPEALED IN THE STATE COURTS

Enforcement of civil and constitutional rights most certainly entitles a litigant to a day in Court (trial and appeal), but only one. When that combined juridical event has been fairly and effectively essayed, the litigant's entitlement is exhausted. The matter then becomes res judicata effectuating a state of perpetual repose. And, much as the Saturday football game cannot be replayed on Monday, so too the cause cannot be relitigated.

The State Courts have concurrent jurisdiction with the Federal Courts to

determine constitutional issues. Bonner v. Cir. Ct. of City of St. Louis, Mo., 526 F.2d 1331 (8th Cir. 1975), cert. den., 96 S.Ct. 1418, 424 U.S. 946, 47 L.Ed.2d 353 (1976).

Upon State adjudication, a Federal Court must give to the Judgment of a State Court the same preclusive effect as would be given that Judgment under the law of the State in which the Judgment was rendered. 28 U.S.C.A., Sec. 1738, Dennison v. County of Frederick, 726 F.Supp. 137 (W.D.Va. 1989), aff'd., 921 F.2d 50 (4th Cir. 1990), cert. den., 111 S.Ct. 2828, 115 L.Ed.2d 998 (1991).

In the case at bar, the pleadings, Pretrial Order and trial record in the

State Trial Court all demonstrated, to the District Court's satisfaction, that petitioners' purported constitutional and civil rights issues were framed, evidence adduced, were considered and determined by the State Trial Court (DMa-2). On appeal, all the constitutional and civil rights appellate issues were presented and adjudicated. (DMa-19) And it was as to these matters that the New Jersey Supreme Court denied Certification! 133 N.J. 433 (1993).

Upon plenary review, the District Court recognized the prior State Court consideration and determination of these issues, and dismissed petitioners' Complaint on defendants' Motions. (Psa-2) The Court of Appeals fully comprehended

the preclusive effect of the prior State Court adjudications and affirmed the dismissal of the District Court Complaint. (Psa-5) (Petitioners' Supplemental Appendix)

Such Federal Court determinations were no deprivation of civil and constitutional rights, but were merely a proper recognition of the true legal status of the matter and the right of defendants to the repose and preclusion of res judicata. Both the District Court (Psa-2) and the Court of Appeals (Pa-5) also recognized that the New Jersey entire controversy doctrine (R. 4:30A) precluded the consideration of issues that could have been raised, but were not, or parties that could have been joined, but were not.

II

THE MUNICIPAL DEMOLITION OF A 4 YEAR OLD HALF-BUILT NEW STRUCTURE WHICH THE OWNER REFUSES TO MODIFY TO CONFORM TO VALID ZONING REQUIREMENTS IS NOT CRUEL AND UNUSUAL PUNISHMENT

Petitioners' Complaint in the District Court never sought to invoke the protection of the Eighth Amendment to the United States Constitution. Nor did petitioners invoke Eighth Amendment protection before the Court of Appeals. Thus, petitioners' Eighth Amendment arguments have no genealogy in the case. Bridging such impediment, such arguments also lack factual or legal basis.

The Eighth Amendment to the United States Constitution simply reads:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Chief Justice Hughes, writing for a unanimous Court in In re Quinlan, 70 N.J. 10, 37-8 (1976), cert. den., 97 S.Ct. 319, 429 U.S. 922, 50 L.Ed.2d 289 (1977), held the Eighth Amendment irrelevant to matters other than **sanctions in criminal cases**:

". . . Historic in nature, it stemmed from punitive excesses in the infliction of criminal penalties. We find no precedent in law which would justify its extension to the correction of social injustice or hardship. . . . Yet the constitutional base of protection from 'cruel and unusual punishment' is plainly irrelevant to such social ills which must be remedied, if at all, under other concepts of constitutional and civil right."

In a footnote to the above passage, the Chief Justice further explained:

". . . [T]he cases construing it have consistently held that the 'punishment' contemplated by the Eighth Amendment is the penalty inflicted by a court for the commission of a crime or in the enforcement of what is a criminal law. . . . A deprivation, forfeiture or penalty arising out of a civil proceeding or otherwise cannot be 'cruel and unusual punishment' within the meaning of the constitutional clause." Id., at 37.

See also, Popow v. City of Margate, 476 F. Supp. 1237, 1242 (D.N.J. 1979) (Ftnt 2):

". . . **The Eighth Amendment is limited to criminal punishment.** Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L. Ed.2d 711 (1977); . . . Bell v. Wolfish, --- U.S. ---, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)." (Emphasis Supplied)

In considering this putative issue, it should be kept in mind that the demolition proceeded as an exercise of the defendant BOROUGH's **police powers**, pursuant to N.J.S.A. 40:48-2.3, which provides:

". . . Whenever any municipality. . . finds . . . any buildings which are unfit for . . . occupancy, or use, due to conditions . . . detrimental to the **health or safety or otherwise inimical to the welfare** of the residents of said municipality power is hereby conferred upon such municipality to **exercise its police powers to . . . demolish** . . . such building...." (Emphasis Supplied)

See also, N.J.S.A. 40:48-1.1, 40:48-2.3a and 40:48-2.5.

It is abundantly clear that the authority by which the subject building was demolished was not the criminal law, but the civil police powers of a governmental subdivision, conferred by express statute provision of the State Legislature.

III

A DEVELOPER WHOSE GRAVAMEN HAS BEEN ADJUDICATED AND DENIED IN STATE TRIAL AND APPELLATE COURTS IS NOT ENTITLED TO DAMAGES FOR LEGITIMATE POLICE POWER ACTION TAKEN BY A MUNICIPALITY WHERE NO NEW LEGAL OR EQUITABLE RIGHT EXISTS

The nub of the operative jurisprudential principles in this respect was fully grasped and articulated by Judge Becker for the Court of Appeals, as the fulcrum of its affirmance of the decision below in this case:

> "Plaintiffs have argued that these doctrines [res judicata, entire controversy and full faith and credit] do not bar the federal action because the property had not yet been demolished during the state [Court] proceedings. We are sympathetic to this claim, but unfortunately it is unavailing. While plaintiffs' federal court action sought new remedies based on the demolition, **plaintiffs assert precisely the same constitutional issues as those raised in the state litigation.** . . . We are con-

strained, however, by res judicata and the entire controversy doctrine. Accordingly, the order dismissing plaintiffs' complaint must be affirmed." (Pa-8) (Emphasis Supplied)

A new remedy addressing a further development in a case does not constitute a cause of action. The cause of action classically must consist of a duty, breach of that duty, with damage proximately caused. Once the duty and breach of that duty have been adjudicated and found wanting, there can be no phoenixlike revival from the ashes of litigation because a new remedy is invoked. It makes no difference whether the genesis of the duty implicated is federal or state law. This is the thrust and repose of res judicata, universally recognized in our legal system.

CONCLUSION

S.C.U.S.R. 10 specifies:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. . . ."

The "compelling reasons" exemplified in the Rule partake of an important and significant jurisprudential nature, either not settled by this Court or in conflict with this Court's prior determinations. Also implicated should be matters of compelling societal importance.

The matter at bar does not partake of a serious and consequential nature meriting this Court's attention. The subject matter involved is parochial: of concern

to the immediate parties, and the issues raised suffer the disability of having been previously considered and adjudicated by Trial and Appellate Courts of competent jurisdiction.

Moreover, plaintiffs' arguments are specious and the principles invoked are either not implicated in the array of facts or are not aptly applied.

Both the District Court and the Court of Appeals gave this matter plenary consideration and apparently strove mightily to find merit in plaintiffs' contentions. Those efforts had to yield to the settled requirements of legal principle, precedent and right reason.

Plaintiffs' Petition for Certiorari should be denied.

Respectfully submitted,

LIEBOWITZ & LIEBOWITZ
Attorneys for Municipal Defendants

Joseph A. Clark, Jr.

Dated: December 23, 1996

APPENDIX TABLE OF CONTENTS

	Page
Letter Opinion of State Trial Court, Law Division, Superior Court of New Jersey, Dated April 10, 1991	2a
Per Curiam Opinion of State Appellate Division, Superior Court of New Jersey, Filed October 28, 1992	19a

SUPERIOR COURT OF NEW JERSEY

Benedict E. Lucchi
Judge

LETTER OPINION

April 10, 1991

Frederick L. Bernstein, Esq.
90 Main Street
Hackensack, NJ 07601

Randal W. Habeeb, Esq.
Diktas & Habeeb
9W Office Center
22 Fletcher Avenue
Fort Lee, NJ 07024

Re: Antonino Enterprises, Inc. v.
Cliffside Park Planning Board
Docket No. L-9350-90

Antonino Enterprises, Inc. v.
Frank Pollotta, et al.
Docket No. L-04926-90

Matesic v. Cliffside Park
Board of Adjustment, et al.
Docket No. L-4927-90

Dear Counselors:

Three consolidated cases are before

the court involving common issues pertaining to zoning in Cliffside Park. The plaintiff in two of the cases is Antonino Enterprises, Inc., a builder who has constructed a number of homes in Cliffside Park. Antonino owns lots located at 409 Nelson Avenue in Cliffside Park. On August 8, 1989, Cliffside Park adopted a new zoning ordinance changing the zoning applicable to Antonino's lot from and one and two-family zone to exclusively a one-family zone. On September 1, 1989, plaintiff submitted an application to Frank Pollotta, a Cliffside Park construction official, to build a two-family home on the lot, which had previously contained a single-family home.

On October 2, 1989, the building inspector issued a building permit for Antonino to construct a two-family house on the lot. However, his issuance of the permit was evidently a mistake. The home plaintiff seeks to build actually requires variances from the zoning ordinance for front yard set-back, rear yard set-back, lot coverage, lot area per dwelling unit and a waiver for an interior parking stall.

It was not until January 3, 1990, that the construction official realized that he had erred in the issuance of the building permit. He issued a stop-work order for the partially constructed home. Antonino then applied to the Cliffside

Park Board of Adjustment for the appropriate variances.

The Board of Adjustment heard extensive testimony on February 26, 1990. At this time Antonino presented the testimony of John C. Inglese, P.E., of the Tesis Architects. Inglese indicated that plaintiff's structure is a three story building, with three bedroom apartments on the upper two floors, while the basement level contained garages as well as a room and a bathroom. He noted that the lot coverage of the structure was 46.88 percent as compared to the 40 percent limitation of the ordinance. In addition, front yard and rear yard variances were required for the 20 fee yards on the

property as compared to the 25 foot requirement of the ordinance. Antonino also presented testimony from a professional planner on the character of the zone and surrounding lots. The viewpoints of several neighbors were offered at the hearing in opposition to plaintiff's construction. Antonino then amended his proposal and agreed to accept a restriction to a two-family home and made certain changes with regard to the layout and access to the first floor. However, on April 23, 1990, the board voted to deny the application.

At this time Antonino's structure is significantly completed. It is fully enclosed with a majority of windows in

place. Antonino has instituted these suits challenging the adoption process of the Cliffside Park zoning ordinance, and seeks to have the building permit reinstated so that the construction can be completed.

Also before the court is the companion case of Matesic v. Cliffside Park Board of Adjustment, et al. in which issues similar to those in Antonino are raised. The Matesic's own a slot on Oakdene Avenue which presently contains a fire-damaged single family home. The Matesics would like to tear down this structure and replace it with a two-family home for use by the parents and son and daughter-in-law.

However, the area is zoned for one-family use. The Matesics allege that the property is in close proximity to other multi-family structures. The Matesics sought approval form the Cliffside Park Board of Adjustment for a variance to construct a two-family home, but were denied, a denial which will stand as there has been no showing that it was arbitrary, capricious, or unreasonable.

The first assertion by the plaintiffs is that the Cliffside Park zoning ordinance was not properly adopted. I am not convinced that this is the case. The Borough has demonstrated that the zoning ordinance and map were filed with the County Planning Board on August 30, 1989,

and that these zoning regulations are reasonable in scope and requirement.

Furthermore, the issue of whether the present zoning ordinance was properly adopted is really of no moment to the question before us. While Antonino's property has changed to an exclusively one-family zone, Antonino is in violation of certain zoning requirements under either the former or present zoning ordinance. For example, even when viewed by the old standard, Antonino's project violates the lot coverage standard. Thus, no matter which ordinance was in effect, Antonino needed a variance to proceed with the construction.

Antonino and Matesic also claim that

the Juric property at the corner of Palisade Avenue and Grant Avenue is an example of the disparate treatment of property owners by the zoning authorities in Cliffside Park. Antonino alleges that at approximately the same time as his application was being rejected by the Board of Adjustment, Juric received approval to build a two-family home that is much larger than plaintiff's proposed structure.

However, after inspecting all three sites, I find this claim to be without merit, due to significant differences in the location of the property. Antonino's property is on a side street in a wholly residential area. The Juric structure is

located on one of the main thoroughfares in Cliffside Park, and is in close proximity to several high-rise apartment buildings and commercial properties. These significant differences in the character of the neighborhoods surrounding the subject properties clearly refutes Antonino's claim that he is entitled to similar zoning approvals as those granted to Juric. This Analysis applies equally to Matesic's claims. The Matesic property is located in a residential area some distance from any major road. The significant differences between the Juric and Matesic properties and their locations belie any comparisons of what is permitted to be constructed on each. The issuance

of variances is by nature fact-sensitive and what may be acceptable at one location may be totally inappropriate at another.

Perhaps the most troubling question raised is whether the Borough should now be estopped from revoking Antonino's building permit in light of the fact that Antonino worked on the house for about two months before the building permit was invoked and the structure is nearer to completion than not.

In support of their right to revoke the building permit permanently, defendants rely on the case of Jantausch v. Borough of Verona, 41 N.J.Super. 89 (Law Div. 1956), aff'd 24 N.J. 326 (1957). The relevant portion of the lower court

opinion in Jantausch sets forth three categories of cases in which the issue of whether a municipality is estopped from revoking a building permit will arise.

Antonino's case falls clearly into the category of there being "no semblance of compliance with or authorization in the ordinance" for the issuance of the permit. Jantausch, 41 N.J.Super. at 94. Notwithstanding plaintiff's claim that the Cliffside Park zoning ordinance is procedurally defective, plaintiff's project would at the very least be in violation of the zoning requirement concerning lot coverage under either the old or new ordinance, so this analysis is applicable in either situation.

As Jantausch indicates, under this category of cases "the deficiency is deemed jurisdictional and reliance will not bar even a collateral attack after the expiration of time limitation applicable to direct review." Jantausch, 41 N.J.Super. at 94. Under this set of facts there is as a matter of law no opportunity for the operation of estoppel in plaintiff's favor. The building permit was issued by the official; in complete contravention of the dictates of the zoning ordinance. Passage of time or raising of the structure do not validate this act. Although Antonino has expended considerable sums on construction of the building, this cannot undermine the clear

principle that the purpose of the zoning regulations is to protect the public good. Any project that runs counter to the zoning regulations and is not exempted from compliance by variance or other exception must be viewed as detrimental to the public interest. Simply because an official has committed a clear error in issuing a building permit does not mean that the public must bear the burden of this mistake. Allowing estoppel to operate in such instances confounds the purpose of zoning and results in harm to those that zoning is supposed to protect.

Furthermore, Antonino cannot claim that this project innocently proceeded, content in the belief that the building

permit validated the work. As the Tesis Architects' drawing of the Antonino site plan clearly indicates, the project required five variances. This drawing is dated September 11, 1989, the time of plaintiff's application for the building permit. Plaintiff is a builder who has worked in Cliffside Park on previous occasions, and knew or should have known from the clear language of the architect's site plan drawing that variances were required for this project before building permit could rightfully issue. Thus Antonino is not free from some amount of blame for this chain of events, seeing as construction proceeded despite knowledge that variances were required.

Finally, plaintiffs allege that their due process and equal protection rights were violated and seek relief under the Civil Rights Act. However, plaintiff raises only this general assertion without specific examples to support it. Further, my review of the record fails to reveal bad faith, maliciousness, or discriminatory intent on the part of the defendants. This claim is therefore denied.

In conclusion, I am satisfied that all claims by the plaintiffs, Antonino and Matesic, including those not expressly

discussed in this opinion, are clearly without merit and are thus denied.

Very truly yours,

/s/

Benedict E. Lucchi, J.S.C.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5166-90T5

ANTONINO ENTERPRISES, INC.
Plaintiff-Appellant

v.

[Filing Date
Oct 28, 1992]

CLIFFSIDE PARK PLANNING BOARD,
and

ANTONINO ENTERPRISES, INC.,
Plaintiff-Appellant,

v.

FRANK POLLOTTA, Construction
Official of the Borough of
Cliffside Park; MAYOR AND COUNCIL
OF THE BOROUGH OF CLIFFSIDE PARK;
and CLIFFSIDE PARK BOARD OF
ADJUSTMENT,
Defendants-Respondents.

Argued Oct. 1, 1992 Decided Oct 28, 1992
Before Judges Brody, Thomas and Landau
On appeal from Superior Court of New Jersey, Law Division, Bergen County
Frederick L. Bernstein argued the cause for appellant
Randal W. Habeeb argued the cause for respondents (Diktas & Habeeb, attorneys)

PER CURIAM

Antonino Enterprises, Inc. (Antonino) appeals from a judgment of the Law Division, Bergen County, which rejected challenges to Cliffside Park's Zoning Ordinance and reexamined Master Plan, and its appeal from the Board of Adjustment denial of its request for a variance.

On August 8, 1989, the Borough of Cliffside Park held an adoption hearing on a new zoning ordinance ("Ordinance #17-89) which changed the zone of appellant's property from one which permitted two-family residential use to one restricting further development to one-family residential use. On September 1, 1989, appellant submitted an application and

architectural plans to the Cliffside Park construction official, for the construction of a two-family home on such property.

A building permit was mistakenly issued by the official on October 2, 1989. Antonino commenced construction soon thereafter. A stop Work Order was issued on January 3, 1990 by the construction official upon realizing his mistake. The Stop Work Order issuance was based upon violation of the one-family limitation of the new zoning ordinance. By that time, the building had been framed, footings were in and substantial costs had been expended.

On January 9, 1990 Antonino applied

to the Cliffside Park Zoning Board of Adjustment for use and bulk variances to Ordinance #17-89. A hearing on the application was held by the Cliffside Park Board of Adjustment on February 26, 1990.

Antonino requested the following variances from the provisions of Ordinance #17-89:

(1) Use variance for a two-family dwelling in a single-family zone. (Required: 1 family.) (Proposed: 2 family).
(2) Front yard variance (according to appellant's engineer). (Required: 25 feet.) (Proposed: 20 feet)
(3) Rear yard variance. (Required: 25 feet.) (Proposed: 20 feet.)
(4) Lot coverage variance. (Required: 40%.) (Proposed: 46.88%.)
(5) Lot area per dwelling unit variance. (Required: 5,000 square feet.) (Proposed: 2,500 square feet.)

Testimony from a professional planner was presented on the character of the zone and

the surrounding lots. Viewpoints of several neighbors were offered at the hearing in opposition to Antonino's construction. Some objections were based upon the fear that the house would be used for three family occupancy. Antonino agreed to amend its proposal to restrict the structure to two-family dwelling use.

At the conclusion of the hearing the Board denied the Antonino application.

An action in lieu of prerogative writ was filed in the Law Division on April 16, 1990, entitled Antonino Enterprises, Inc. v. Frank Pollotta, Construction Official of the Borough of Cliffside Park; Mayor and Council of the Borough of Cliffside Park; and Cliffside Park Board

of Adjustment, Superior Court of New Jersey, Law Division, Bergen County. This challenged the Board's decision as arbitrary, capricious and unreasonable, and also alleged discrimination based upon grant of a variance for similar purposes to another property owner (Juric).

On April 23, 1990 the Board of Adjustment adopted a resolution memorializing the denial of the Antonino application. The Board found in part that:

(1) the plaintiff proposed a prohibited use.
(2) the plaintiff did not provide proofs that the use would serve the public good.
(3) the use does not further the Land Use Act.
(4) the variances necessary would be inconsistent with the Zone Plan.

(5) the structure would block air and light.
(6) hardship was self-imposed.

A similar prerogative writ action was filed on April 16, 1990, by other parties. This action was entitled Matesic v. Cliffside Park Board of Adjustment; Park Construction Official; Mayor and Council of the Borough of Cliffside Park; and Stipo Juric, Superior Court of New Jersey, Law Division, Bergen County. This action also alleged discriminatory practice by the governing bodies based upon the approval of the Juric variances and the denial of the Matesics' request for variances.

On May 10, 1990 Cliffside Park adopted its "Reexamination of the Land Use

Plan, Master Plan, and Housing Element." See N.J.S.A. 40:55D-89.

Thereafter, on July 29, 1990 Antonino filed another complaint entitled Antonino Enterprises, Inc. v. Cliffside Park Planning Board, in which it challenged the Planning Board's Reexamination of the Master Plan as an unconscionable action contrary to the intent of the Land Use Law.

The above matters were consolidated for trial before the Honorable Benedict E. Lucchi. A nine-day trial commenced on December 18, 1990 and concluded on March 4, 1991.

During trial, the court admitted an expert report which referred to numerous

findings in the 1979 Master Plan to show that the changes adopted by Ordinance #17-89 were proposed as early as January, 1979 in the Borough's Master Plan and Land Use Element. Essentially, these findings enunciated a policy that problems in this highly urbanized community required that single family use be encouraged and that future two family and multi-family development or conversions should be restricted. The May 10, 1990 Reexamination Report reaffirmed these findings, thus supporting Cliffside Park's argument that Ordinance #17-89 is consistent with its Master Plan.

Following trial, the judge issued a letter opinion, which found: that the

Borough had demonstrated that ordinance #17-89 was properly filed with the Planning Board and was reasonable in its scope and requirements; that even under the prior ordinance Antonino would have required a lot coverage variance to proceed with construction; that a variance granted to Stipo Juric did not evidence disparate treatment due to the differing nature of the locations that an estoppel should not apply; and that Antonino's architectural plans showed that he knew or should have known of the existence of Ordinance #17-89 and the necessity to seek variances therefrom before proceeding. Judgments consistent with the opinion followed, and Antonino

appealed. The Matesics did not join in the appeal. We affirm.

Reexamination of Master Plan

Antonino asserts that Cliffside Park's failure to examine its municipal Master Plan by August 1, 1988 resulted in its total loss of authority to continue regulation of development. It is undisputed that the Borough did not adopt its Reexamination of the Land Use and Master Plan until May 10, 1990.

Arguing that this means that the Borough did not have in place a valid zoning ordinance or development restriction limiting the use of its property to a single family dwelling, Antonino cites an unpublished Law Division

opinion, Westfield, Inc. v. Twp. of Rochelle Park, decided November 1989. Our reading of Westfield satisfies us that it does not support Antonino's case.

Westfield involved a developer's application for site plan approval before the Planning Board of Rochelle Park. The application was prosecuted between August 1988 and August 1989 at a time when the Board had failed to adopt a Reexamination of Master Plan pursuant to N.J.S.A. 40:-55D-89. The court noted that the failure to adopt a timely re-examination triggered N.J.S.A. 40:55D-89.1.

The Westfield court concluded on the facts present that N.J.S.A. 40:55D-89.1 shifted the burden of proof from the

applicant to the municipality to sustain validity of its development regulations. However, only upon finding that the municipality offered no proof as to the reasonableness of its residential zoning designations, did the court declare that the plaintiff's land was unzoned.

Many of the questions arising out of N.J.S.A. 40:55D-89 and 89.1 were discussed in Lionshead Woods Corp. v. Kaplan Bros., 243 N.J.Super. 678 (Law Div. 1990). There it was stated that where the statutorily mandated review had not been performed, N.J.S.A. 40:55D-89.1 would be triggered and the municipality faced an "artificial presumption" of invalidity requiring it to meet both the burden of

going forward and the burden of proof. Id. at 683. On this reasoning, a municipality would have the burden to rebut the presumption of invalidity by evidence adequate to raise a debatable question as to its validity.

We believe that the defendants have offered not only sufficient proof to raise a debatable issue on the validity of Ordinance #17-89, but have also adequately demonstrated its consistency with the Master Plan.

Both the 1979 Master Plan and a later 1982 Reexamination Report found that too much of the Borough's limited area was zoned for two-family, multi-famuily, commercial and industrial usage.

Antonino does not dispute that Ordinance #17-89 is apparently consistent with the 1979 Master Plan, the 1982 Reexamination, and the 1990 Reexamination Report. It is apparent that the Legislature, through enactment of N.J.S.A. 40:55D-89 and 89.1, intended to ensure that a municipality's master plan and zoning ordinance reflect the most current and contemporary needs of the community. Medici v. BPR Co., 107 N.J. 1, 20 (1987). An appellate court should attempt to effectuate the most current policy declared by a legislative body. Kruvant v. Mayor & Council Tp. of Cedar Grove, 82 N.J. 435, 440 (1980). We therefore find that on August 8, 1989, Ordinance #17-89

was adopted and was consistent with the 1979 Master Plan, the 1982 Reexamination Report and the 1990 Reexamination Report of the Master Plan.

Planning Board Referral

Antonino also argues that the Borough failed to refer Ordinance #17-89 and its amendments to the Planning Board as required by N.J.S.A. 40:55D-64 and 26. Section 64 provides:

> Prior to the hearing on adoption of a zoning ordinance, or amendments thereto, the governing body shall refer any such proposed ordinance or amendment thereto to the planning board subject to subsection 17a of this act.

It is undisputed that the adoption hearing for Ordinance #17-89 was held on August 8, 1989. Defendants have set forth evidence

that the original zoning ordinance proposal was referred to the Planning Board which subsequently enacted a resolution calling for the adoption of said Ordinance.

However, it is also undisputed that several amendments were made to #17-89 at the time of the August 8th adoption hearing. Appellant contends that these changes were substantial and required referral of the Ordinance back to the Planning Board.

Several cases have held ordinances and amendments invalid for failure to refer them to the planning board prior to adoption. See Mulligan v. City of New Brunswick, 83 N.J.Super. 185, 189-90

(L.Div. 1964); Hasbrouck Heights Hosp. Ass'n v. Borough of Hasbrouck Heights, 15 N.J. 447, 454-55 (1954); Sheerr v. Evesham Tp., 184 N.J.Super. 11, 60 (L.Div. 1982).

However, it is important to note that, substantial or not, the questioned amendments to Ordinance #17-89 have no affect upon the Antonino property. When a portion of a zoning ordinance is declared invalid, the remainder will be left in force if such a course is consistent with the presumed intention of the municipal body, and if it can operate as an integrated unit independent of the invalid portions. Brundage v. Randolph Tp., 54 N.J.Super. 384, 395 (App.Div. 1959) aff'd. 30 N.J. 555 (1959); See also, Mountcrest

Est., Inc. v. Rockaway Mayor and Tp. Committee, 96 N.J.Super. 149, 156-57 (App. Div. 1967), certif. den., 50 N.J. 295 (1967) (court found that invalidity of open space provision amendments to zoning ordinance did not relieve builder of complying with lot size requirements since open space provisions were severable).

Ordinance #17-89 specifically provides for severability of invalid sections. A finding that the amendments of #17-89 are invalid would not impair the overall function of the ordinance nor relieve Antonino of the zoning requirements on its property. 1

---

1 We note that for the same reasons, even if the Borough was required to publish each of the amendments to

PUBLICATION

Antonino says that the municipality failed to properly publish the ordinance pursuant to N.J.S.A. 40:49-2.1 because it did not adequately alert the public to the changes made, citing Wolf v. Shrewsbury, 182 N.J.Super. 289 (App.Div. 1981), certif. den., 89 N.J. 440 (1982) for this proposition. There, having found that the publication did not alert the public to the nature and scope of the proposed that the ordinance was invalid. Id. at 295-296. However, in Shrewsbury the notice merely informed the public in general

---

1 cont.:

Ordinance #17-89 and failed to do so, the invalidity of the amendments would not entitle appellant to relief.

terms that the new ordinance was being revised to conform with the Master Plan and contained no indications of what type of changes would occur. The notice in the present case, however, provided adequate notice to the public of the scope and nature of the provisions within the new Ordinance. It stated that the former zoning ordinance would be replaced in its entirety and listed numerous specific headings illustrative of the broad scope of what was addressed in the new Ordinance (i.e., residential and commercial zone regulations, conditional uses, parking, signs, performance standards, design standards, etc.). Furthermore, appellant admits in its brief that it was present at

the hearing which considered Ordinance #17-89. We find that the Borough's publication of Ordinance #17-89 adequately informed the public of the essence and scope of the broad changes the Ordinance would effectuate.

REASONABLENESS OF VARIANCE DENIAL

Antonino contends that the Board's decision in denying its variance request was arbitrary, capricious and unreasonable. We disagree.

Our review is limited to determining whether the Board's decision was arbitrary, unreasonable or capricious.

Kramer v. Bd. of Adjustment, Sea Girt, 45 N.J. 268, 296-297 (1965). This standard stems from the recognition that local officials "who are thoroughly familiar with their community's characteristics and interests and are the proper representatives of its people, are undoubtedly the best equipped to pass initially on such applications for a variance." Ward v. Scott, 16 N.J. 16, 23 (1954). Variances should be granted sparingly and with caution, since they tend to impair sound zoning and subvert the zone plan. Cerdel Construction Co., Inc. v. East Hanover Tp., 86 N.J. 303, 307 (1981). Consequently, a court should give greater deference when the appeal is from

a denial of a variance. Mahler v. Bd. of Adjustment, Fair Lawn Borough, 94 N.J. Super. 173, 186 (App.Div. 1967), aff'd o.b., 55 N.J. 1 (1969).

To grant a variance under N.J.S.A. 40:55D-7(d), a board must find that (1) special reasons exist for the variance, and (2) the variance can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance. Cerdel, supra 86 N.J. at 307. The applicant must produce the evidence demonstrating that it meets these statutory requirements. Chirichello v. Zoning Board of Adjustment, Monmouth Beach, 78 N.J. 544, 559-560

(1979).

Despite the very broad parameters of the phrase "special reasons," the overwhelming majority of (d) variance cases fit within one of three categories of special reasons: (1) hardship; (2) the use is an inherently beneficial one, such as a school or hospital, and (3) the use is not inherently beneficial but promotes the general welfare because of its peculiar suitability to the particular location. Medici v. BPR Co., 107 N.. 1, 9-18 (1987). The question before the reviewing court is whether the record before the zoning board revealed special reasons taken in their aggregate. Kramer supra, 45 N.J. at 287.

Upon review of the record before the zoning Board, it is apparent that appellant's argument to the Board focused upon the existence of older two-family lots on the block and other structures of similar bulk.

These arguments, however, do not establish "special reasons". Case law is clear that the existence of other nonconforming uses, even if permitted by variance, provides no ground for granting yet another variance. Ward v. Scott, 11 N.J. 117 (1952). See also Loscalzo v. Pini, 228 N.J.Super. 291, 300-301 (App. Div. 1988), certif. den., 188 N.J. 216 (1989) (a large number of non-conforming structures in the neighborhood where

defendants' building is located is not a criterion on which special reasons may be based).

Furthermore, the fact that appellant's property is substantially built does not constitute a "special reason". The courts have held that personal economic hardship does not constitute a "special reason". See Loscalzo, supra, 228 N.J.Super. at 301-303 (substantial sums were expended in reliance on a mistakenly issued permit did not constitute undue hardship) Keller v. Town of Westfield, 39 N.J.Super. 430, 435 (App.Div. 1956) (undue hardship arising from money expended in making improvements did not qualify as special

reasons contemplated by statute for variance awardance); V.F. Zahodiakin &c., Corp. v. Bd. of Adjustment, Summit, 8 N.J. 386, 395-96 (1952) (zoning officers' disregard of ordinance, and expenditure of moneys by builder for prohibited use will not validate grant).

In determining whether an applicant has established the requisite "special reasons" for a variance, only those reasons which advance the general purposes of zoning as set forth in N.J.S.A. 40:55D-2 may be considered. Loscalzo v. Pini, supra, 228 N.J.Super. at 300-301; Medici, supra, 107 N.J. at 18. Antonino did not set forth any evidence below which would support such a finding. To the contrary,

defendants have presented evidence that the 1979 Master Plan, 1982 Reexamination Report, and the 1990 Reexamination Report list excessive two-family zoning as a problem to be corrected.

The proposed two-family structure does not further the purpose of planning in Cliffside Park. This fact alone would be justification for denial by failure to show the nonexistence of a "negative criteria". Lack of negative criteria must be shown in all variance cases. In Weiner v. Zoning Bd. of Adjust. of Glassboro, 144 N.J.Super. 509, 516 (App.Div. 1976), certif. den., 73 N.J. 55 (1977), a subsection (d) case, the court stated:

> It was not the burden of the board to find affirmatively that the plan

would be substantially impaired (although it did so in the instant case). It was, rather the burden of the applicant to prove the converse. See Ring v. Mayor and Council of Rutherford, 110 N.J.Super. 441, 445 (App.Div. 1970), certif. den., 401 U.S. 911, 91 S.Ct. 876, 27 L.Ed.2d 810 (1971).

The findings of the Board and the trial judge echo this analysis and were not unreasonable.

ESTOPPEL

Antonio also urges that his reliance on the mistakenly issued building permit should be held to estop Cliffside Park from issuing the Stop Work Order. The starting point for review of such an argument is Jantausch v. Borough of Verona 41 N.J.Super. 89 (L.Div. 1956), aff'd., 24 N.J. 326 (1957). Judge (later Chief Justice Weintraub there held that an

estoppel depends upon the circumstances surrounding the issuance of the permit. By way of dictum, Jantausch, refers to three categories in which the issue of estoppel may arise: (1) where a permit is regularly issued in accordance with the ordinance, it may not be revoked after reliance unless there is fraud; (2) where there is no semblance of compliance with or authorization in the ordinance, the deficiency is jurisdictional and estoppel cannot be asserted; and (3) the "intermediate situation" where the administrative official in good faith makes an erroneous interpretation of the ordinance and the property owner relies in good faith. Id. at 93-94. Only in the third category can

an estoppel be established. Here, the trial judge found that this case fell within the second category where there was "no semblance of compliance with or authorization in the ordinance". We agree.

The case of Howland v. Freehold, 143 N.J.Super. 484 (App.Div. 1976), certif. den., 72 N.J. 466 (1976) aptly states that a finding of "good faith" on the part of the administrative official can only be satisfied by finding that "an issue of construction of the zoning ordinance. . . was, when the permit was issued, sufficiently substantial to render doubtful a charge that the administrative official acted without any reasonable basis. . . ."

The zoning officer's admitted mistake

in allowing a two family home in a one family zone precludes a finding that the issuance of the permit had any reasonable basis. The permit was in complete contravention of the duly enacted ordinance with which he should have been familiar. This case clearly falls within the second category of Jantausch and the estoppel argument fails.

Furthermore, as the trial court touched upon, Antonino's architect plan was dated September 1, 1989. A finding that Antonino knew or had reason to know that the permit requested would violate the zoning ordinance is justified on this record.

We have considered the other argu-

ments raised by Antonino: that the Board of Adjustment's attorney's also participated as the Planning Board attorney and his involvement in drafting Ordinance #17-89 constituted a conflict of interest entitling appellant to relief; that representation of all the municipal defendants by a single attorney is against statutory mandates; that eh Mayor influenced the Board's decision in denying the variance and in granting the Juric variance, thus constituting 42 U.S.C., Sec. 1983 claim of discrimination; that appellant's initial variance application should be deemed reclassified as though made under N.J.S.A. 40:55D-70(a); that the Borough adopted Ordinance #17-89 without

the existence of a Land Use Plan and therefore such adoption was ultra vires; that the Board of Adjustment failed to render its decision within the 120 day time limit of N.J.S.A. 40:55D-73; that the ordinance did not take effect until after the town filed the latest zoning map with the Planning Board pursuant to N.J.S.A. 40:55D-16; that the Board of Adjustment's Resolution vote was in violation of N.J.S.A. 40:55D-10, and find that each of these remaining issues is clearly without merit, (R. 2:11-3(e)(1)(E)) and does not warrant further discussion, either as a matter of law or because the record establishes no support for the argument. See DeLuca v. Kahr Bros. Inc., 171 N.J.

Super. 100 (L.Div. 1979); Patel v. Planning Board of the Township of Woodbridge, 258 N.J.Super. 437 (L.Div. 1992); Lizak v. Faria, 96 N.J. 482, 492-95 (1984).

Affirmed.

No. 96-818 (4)

Supreme Court, U.S.
FILED
DEC 23 1996

In The

Supreme Court of the United States

October Term, 1996

ANTHONY MACERI; ANTONINO ENTERPRISES, INC.,

Petitioners,

vs.

ROBERT CIMMINO, Construction Official; BOROUGH OF CLIFFSIDE PARK; BRIAN T. McGUIRT, Cliffside Park Borough Clerk; STEPHEN T. BOSWELL, Borough Engineer; CHRISTOS J. DIKTAS; DIKTAS & HABEEB, a Law Partnership; THOMAS TORMEY; GERALD CALABRESE, Individually and as Mayor of Cliffside Park; CALABRESE & CO. REALTY, INC.; GERALD A. CALABRESE, JR.; JOHN DOE(S), being a fictitious name,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THOMAS TORMEY

DAVID L. HACK
Counsel of Record
HACK, PIRO, O'DAY, MERKLINGER, WALLACE & MCKENNA, P.A.
Attorneys for Respondent Thomas Tormey
30 Columbia Turnpike
P.O. Box 941
Florham Park, New Jersey 07932
(201) 301-6500

70144

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, Inc.

15 pp

QUESTIONS PRESENTED

I. Should federal courts re-litigate alleged violations of constitutionally based civil rights where those asserted violations were the predicate of actions fully and completely tried and appealed in state courts?

II. Should the individual Respondent Thomas Tormey, a private citizen, be subject to liability for civil rights damages in this action when he was not joined as a party in prior state court litigation where those claims were fully litigated against other respondents herein?

III. Does the Eighth Amendment concept of "cruel and unusual punishment" apply to enforcement of municipal zoning and health and welfare regulations where due process was afforded to a developer who took no steps to abate violations?

LIST OF PARTIES

The Petitioner Anthony Maceri is the sole stockholder, officer and director of the Petitioner Antonino Enterprises Inc.

The corporate entity was the only party plaintiff in the extensive underlying state court litigation and was at all times the owner of the real property and the structure in question.

The Respondent Thomas Tormey is a private citizen who lived in close proximity to the subject real property and also not a party in the state litigation. The complaint in this case against Respondent Tormey alleges in paragraph 10:

> Defendant, Thomas Tormey, is a resident of Clifffside Park. He urged Defendant Calabrese to act, without a hearing or other due process, to revoke plaintiff's building permit as plaintiff's two-family home was nearing completion.

(Resp. App. 1a, *infra*).

Paragraph 31 of Petitioner's complaint further alleges a "conspiracy by two or more of the defendants" to deprive petitioners of their rights. (Resp. App. 1a).

The aforesaid allegations are the only ones asserted in the pleadings against the Respondent Tormey.

The following Respondents have been categorized and identified as the Municipal Respondents: Robert Cimmino, Construction Official; Borough of Cliffside Park; Brian T. McGuirt, Cliffside Park Borough Clerk; Stephen T. Boswell, Borough Engineer; Christos J. Diktas; Diktas & Habeeb, a law

partnership and Gerald A. Calabrese individually and as Mayor of Cliffside Park. Said parties have commonality of interest and are all collectively represented by single counsel.

Respondent Calabrese & Company Realty Inc. is a real estate brokerage corporation and Respondent Gerald A. Calabrese Jr. is alleged to be a 50% owner of Calabrese & Company Realty Inc., a Bergen County Commissioner and the son of Respondent Gerald A. Calabrese.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iv
Table of Citations	v
Constitutional and Statutory Provisions Involved	1
Counter-Statement of the Case	3
Reasons for Denying the Writ	5
I. The constitutional issues and claims here presented are precluded by their prior determination in New Jersey state court proceedings to which full faith and credit must be given.	5
II. The Eighth Amendment, here raised as an issue for the first time, is inapplicable to municipal zoning regulations and the power of the state to protect the health and welfare of its citizens by removing a structure and should not be extended thereto.	8
III. Respondent Thomas Tormey, a private citizen cannot be held liable for damages on any legal theory asserted by Petitioners in this case.	9
Conclusion	10

Contents

TABLE OF CITATIONS

Page

Cases Cited:

Austin v. United States, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) 8

Bernards Quarry v. Borough of Bernardsville, 929 F.2d 927 (3d Cir. 1991), *cert. denied*, 502 U.S. 861, 112 S. Ct. 182, 116 L. Ed. 2d 144 (1991) 6

Cogdell v. Hospital Center at Orange, 116 N.J. 7 (1989) 10

Groman v. Township of Manalapan, 47 F.3d 628 (3d Cir. 1995) 9

Hauptmann v. Wilentz, 570 F. Supp. 351 (D.N.J. 1983), *affirmed*, 770 F.2d 1070 (3d Cir. 1985), *cert. denied*, 474 U.S. 1103, 106 S. Ct. 887, 88 L. Ed. 922 (1986) 9

Ingraham v. Wright, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977) 8

Ward v. Village of Ridgewood, 531 F. Supp. 470 (D.N.J. 1982) 6

Statutes Cited:

28 U.S.C. § 1738 ..... 2, 7

Contents

Page

42 U.S.C. § 1983 ..... 2, 6, 9

N.J.S. 40:48-2.3 ..... 2, 4, 7, 8

United States Constitution Cited:

Fourth Amendment 1, 6, 9

Fifth Amendment 1, 6, 9

Eighth Amendment 1, 8, 9

Fourteenth Amendment 1, 6, 9

APPENDIX

Appendix A — Excerpts From Petitioners' Complaint Filed in the United States District Court for the District of New Jersey on August 24, 1993 ..... 1a

I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

> No person . . . shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eighth Amendment

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Statutes:

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

28 U.S.C. Section 1738

[State] . . . Judicial Proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken.

New Jersey Statutes:

N.J.S. 40:48-2.3

It is hereby found and declared that . . . buildings . . . which . . . are unfit for use are inimical to the welfare and dangerous and

> injurious to the health and welfare of the people . . . that a public necessity exists for the repair, closing or demolition of such building. . . . Whenever any municipality finds [such building] . . . power is hereby conferred upon such municipality. . . to . . . demolish . . . such building . . .

COUNTER-STATEMENT OF THE CASE

The Petitioners filed a verified complaint in the District Court below seeking to enjoin the demolition of a partially constructed two-family residence on a lot in the Borough of Cliffside Park, New Jersey. A claim for damages was also made "in excess of $350,000." Violations of Petitioners' civil rights and other United States constitutional rights are alleged.

Construction of the two-family home in question was commenced pursuant to permits issued by the Borough of Cliffside Park. However, immediately prior to commencement of construction, the governing body of the municipality adopted an amendment to the zoning ordinance changing Petitioners' lot and others from a two-family-residence zone to a single-family-residence zone.

During construction, the Petitioner Antonino Enterprises, Inc. sought to obtain appropriate zoning variances to permit completion of the structure as a two-family residence which variances were denied by the municipal regulatory bodies.

Thereafter, Petitioner Antonino Enterprises, Inc. instituted litigation in the courts of the State of New Jersey seeking to obtain relief from the denial of the requested variances claiming its civil rights were violated along with other rights protected by the United States Constitution. The Respondent Thomas

Tormey was not named as a defendant in the New Jersey proceedings.

The New Jersey Court litigation resulted in determinations by the Superior Court, Chancery Division and Superior Court, Appellate Division and New Jersey Supreme Court (denial of certification) that Petitioner's claims for relief should be denied.

At the conclusion of the New Jersey state court litigation, the Borough of Cliffside Park advised the Petitioners that unless the partially completed two-family structure was brought into compliance with the amended zoning ordinance that demolition would ensue.

The Petitioners then filed the present action in the United States District Court for the District of New Jersey and for the first time named Respondent Tormey as a defendant. On Petitioners' application, a temporary restraining order and order to show cause against demolition was issued in the District Court below. The injunctive relief was ultimately denied by the trial court and an emergent appeal to the Third Circuit also resulted in denial of injunctive relief. In the course of these proceedings Petitioners were offered the opportunity to bring the building into zoning compliance. Petitioners refused.

Thereafter the Borough of Cliffside Park proceeded with the demolition of Petitioner Antonino Enterprises, Inc.'s structure as permitted by N.J.S. 40:48-2.3.

On motions by all Respondents, the District Court below dismissed the complaint of the Petitioners for failure to state a cause of action. The court found that all causes of action had been heard and adjudicated in prior litigation in the courts of the State of New Jersey and that the entire controversy doctrine was applicable. The court below also ruled that Respondent

Tormey's alternate summary judgment motion relief was moot by virtue of the court's dismissal of the complaint for failure to state a cause of action.

The District Court thereafter imposed monetary sanctions against Petitioners and their attorney for bringing duplicative litigation by way of this suit. Sanctions were vacated by the District Court on the basis that Petitioners' attorney made a good faith judgment that he could proceed in this case due to the subsequent demolition of Petitioners' building by the Borough of Cliffside Park. No ruling was made that the demolition constituted or was the basis of a new cognizable cause of action.

The Third Circuit below affirmed all aspects of the District Court determinations.

The Petitioners now seek a review of the Third Circuit's affirmance of the dismissal of their complaint.

REASONS FOR DENYING THE WRIT

I.

THE CONSTITUTIONAL ISSUES AND CLAIMS HERE PRESENTED ARE PRECLUDED BY THEIR PRIOR DETERMINATION IN NEW JERSEY STATE COURT PROCEEDINGS TO WHICH FULL FAITH AND CREDIT MUST BE GIVEN.

The underlying basis of all of Petitioners' arguments in seeking the grant of a writ of certiorari is that actual demolition of the structure took place after the conclusion of the state court litigation. It is claimed that the demolition was a fundamental violation of a property owner's constitutional rights thereby giving standing to the complaint dismissed below.

In the first instance, Petitioners argue that the prior state court litigation did not include a determination of the Petitioners' constitutional claims to wit: — violations of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

It is clear from the opinion of the Third Circuit below that it, as well as the District Court, fully recognized that the constitutional claims were litigated in the New Jersey state courts. (Pet. App. 8A,9A). Even if they were not litigated, the New Jersey entire controversy doctrine applies. Indeed, this Court has heretofore denied certiorari where civil rights claims were not raised in zoning matters litigated in New Jersey state courts. *Bernards Quarry v. Borough of Bernardsville,* 929 F.2d 927 (3d Cir. 1991), *cert. denied,* 502 U.S. 861, 112 S. Ct. 182, 116 L. Ed. 2d 144 (1991). *See also Ward v. Village of Ridgewood,* 531 F. Supp. 470 (D.N.J. 1982).

Most appropriately, the court in the *Bernards Quarry* case stated:

> Pursuant to the Entire Controversy Doctrine under New Jersey law, a plaintiff is precluded from litigating in a subsequent proceeding both claims that it actually litigated and claims that it could have litigated in an earlier proceeding. To the extent that BQI did not adjudicate every aspect of its federal claims, it is now barred from raising them again.

929 F.2d 930.

To side-step the obvious preclusive effect of the doctrines of *res judicata*, collateral estoppel and entire controversy, Petitioners alternatively urge that the demolition of the structure in question following the conclusion of the state litigation gave rise to additional new or renewed constitutional claims cognizable now in the federal court.

The distinction Petitioners raise is without legal effect. Whether or not the occurrence of demolition was previously addressed, it was certainly a potential future course of action available to the Municipal Respondents of which Petitioners had notice when their constitutional claims were litigated in the state courts. *See* N.J.S. 40:48-2.3.

Petitioners' constitutional claims alleged to be flowing from the demolition are predicated upon the totality of facts and issues concluded adversely to Petitioners in the state litigation. They are one and the same.

No new cause of action was created by the demolition, just additional foreseeable damage not presently actionable, if at all, due to the preclusive effect of the New Jersey judgments and the *res judicata*, collateral estoppel and entire controversy doctrines.

No reason, compelling or otherwise, is advanced by the Petitioners why full faith and credit should not be given for the prior decisions of the New Jersey state courts pursuant to 28 U.S.C. § 1738.

II.

THE EIGHTH AMENDMENT, HERE RAISED AS AN ISSUE FOR THE FIRST TIME, IS INAPPLICABLE TO MUNICIPAL ZONING REGULATIONS AND THE POWER OF THE STATE TO PROTECT THE HEALTH AND WELFARE OF ITS CITIZENS BY REMOVING A STRUCTURE AND SHOULD NOT BE EXTENDED THERETO.

Petitioners' complaint, unamended to date, does not include any claim based on the building demolition being cruel and unusual punishment forbidden by the Eighth Amendment. For this reason alone, consideration to this allegation should not be given.

However, assuming this issue is appropriately before the Court, no equitable or legal implications in this matter compel reconsideration of prior decisions by this Court that the Eighth Amendment prohibitions apply only to criminal or criminal-sounding punishment. *Ingraham v. Wright,* 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); *Austin v. United States,* 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993).

Petitioners' structure was demolished after appropriate due process and Petitioners' failure to abate zoning violations pursuant to a New Jersey legislative declaration that such buildings were a danger to the health and welfare of its citizens. N.J.S. 40:48-2.3. No criminal act was involved and no new criminal conduct was being defined.

III.

RESPONDENT THOMAS TORMEY, A PRIVATE CITIZEN, CANNOT BE HELD LIABLE FOR DAMAGES ON ANY LEGAL THEORY ASSERTED BY PETITIONERS IN THIS CASE

The only specific conduct of the Respondent Thomas Tormey, a private citizen, about which Petitioners' complain is that he urged Mayor Calabrese to "act, without a hearing or due process, to revoke [Petitioners'] building permit . . ." and his act was committed in furtherance of a conspiracy among two or more unspecified Respondents. (Resp. App. 1a).

The Fourth, Fifth, Eighth and Fourteenth Amendments, as asserted to be applicable here, are, of course, directed to state action. So is 42 U.S.C. § 1983, unless private action is taken under color of state law. *See Groman v. Township of Manalapan,* 47 F.3d 628 (3d Cir. 1995) and extensive case citation therein.

At worst, Respondent Tormey called the attention of the Municipal Respondents to an existing zoning violation. Subsequent non-criminal remedial action by the Municipal Respondents ensued. Under any of the three tests elucidated in *Groman:* (1) the exclusive government function test; (2) the joint participation or symbiotic relationship test; or (3) the nexus approach, Tormey's action was only that of a concerned private citizen.

Also, conspiracy allegations pleaded without factual specificity, as is here the case, are insufficient to withstand a motion to dismiss a Section 1983 claim. *Hauptmann v. Wilentz,* 570 F. Supp. 351 (D.N.J. 1983), *affirmed,* 770 F.2d 1070 (3d Cir 1985), *cert. denied,* 474 U.S. 1103, 106 S. Ct. 887, 88 L. Ed. 922 (1986).

Respondent Tormey's alleged conduct was known or should have been known to Petitioners at the time of the state court litigation. He was not named as a defendant, and any legal theory presented against him now in the federal court is barred by the entire controversy doctrine. *Cogdell v. Hospital Center at Orange,* 116 N.J. 7 (1989). *See also* Point I of this brief.

CONCLUSION

The Petition for a Writ of Certiorari is void of the compelling reasons essential to its grant. No court decision is in conflict with another, nor has any court deviated from existing law or usual judicial proceedings. And, no important question of federal law is presented.

Under our system of jurisprudence, not every financial loss has, or, is deserving of the counter-point of an available remedy for damages. This is such a case.

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID L. HACK
Counsel of Record
HACK, PIRO, O'DAY, MERKLINGER,
WALLACE & MCKENNA, P.A.
Attorneys for Respondent
Thomas Tormey
30 Columbia Turnpike
P.O.Box 941
Florham Park, New Jersey 07932
(201) 301-6500

APPENDIX A — EXCERPTS FROM PETITIONERS' COMPLAINT FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ON AUGUST 24, 1993

"10. Defendant Thomas Tomey is a resident of Cliffside Park. He urged Defendant Calabrese to act, without a hearing or other due process, to revoke Plaintiff's building permit as Plaintiff's two-family home was nearing completion."

"31. The Defendants' acts and omissions aforesaid were committed in furtherance of the conspiracy among two or more of the Defendants. . . ."